No. __-___

In the Supreme Court of the United States

TIM SHOOP, WARDEN,

Petitioner,

v.

DANNY HILL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

Page

Appendix A: Order, Sixth Circuit Court of Appeals, April 9, 2018 ..... 1a

Appendix B: Opinion and Judgment, Sixth Circuit Court of Appeals, Feb. 2, 2018..... 3a

Appendix C: Opinion, Sixth Circuit Court of Appeals, Aug. 13, 2002 ..... 68a

Appendix D: Opinion, U.S. District Court for the Northern District of Ohio, Eastern Division, June 25, 2014 ..... 77a

Appendix E: Opinion and Judgment Entry, U.S. District Court for the Northern District of Ohio, Eastern Division, Sept. 29, 1999..... 211a

Appendix F: Opinion, Supreme Court of Ohio, Aug. 26, 2009..... 334a

Appendix G: Opinion, Eleventh Appellate District Court of Appeals, Trumbull County, July 11, 2008..... 335a

Appendix H: Judgment Entry, Trumbull County Common Pleas Court, Feb. 15, 2006..... 381a

Appendix I: Opinion, Supreme Court of Ohio, Aug. 12, 1992..... 494a

Appendix J: Opinion and Entry, Eleventh Appellate District Court of Appeals, Trumbull County, Nov. 27, 1989..... 536a

APPENDIX A

Nos. 99-4317/14-3718

United States Court of Appeals
for the Sixth Circuit

DANNY HILL,
Petitioner–Appellant,

v.

CARL ANDERSON, WARDEN,
Respondent–Appellee,

Filed: April 9, 2018

ORDER

BEFORE: MERRITT, MOORE, and CLAY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court.[1] No judge has requested a vote on the suggestion for rehearing en banc.

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[1] Judge Cook recused herself from participation in this ruling.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT:

/s/Deborah S. Hunt, Clerk

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0024p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 99-4317/14-3718

DANNY HILL,
Petitioner–Appellant,

v.

CARL ANDERSON, Warden,
Respondent–Appellee,

Appeal from the United States District Court
for the Northern District of Ohio at Youngstown.
No. 4:96-cv-00795—Paul R. Matia, District Judge.

Argued: November 30, 2016

Decided and Filed: February 2, 2018

BEFORE: MERRITT, MOORE, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Vicki Ruth Adams Werneke, FEDERAL PUBLIC DEFENDER'S OFFICE, Cleveland, Ohio, for Appellant. Peter T. Reed,

OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** Vicki Ruth Adams Werneke, Lori B. Riga, FEDERAL PUBLIC DEFENDER'S OFFICE, Cleveland, Ohio, for Appellant. Peter T. Reed, Stephen E. Maher, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

OPINION

MERRITT, Circuit Judge. In this death penalty case out of Ohio, Danny Hill asserts in his habeas petition that he may not be executed because he is "intellectually disabled," as now defined in three Supreme Court cases decided in the past fifteen years.[1] *Atkins v. Virginia*, 536 U.S. 304 (2002), was decided and made retroactive after Hill was convicted of murder and sentenced to death, so although Hill raised his intellectual disability as a mitigating factor in the penalty phase of his trial, he was not afforded the constitutional protections set forth in *Atkins* during his original trial. Our court issued a remand order in 2002 directing the State of Ohio to assess Hill's intellectual functioning in light of *Atkins*. *Hill v. Anderson*, 300 F.3d 679 (6th Cir. 2002). The issue now before us is whether that assessment comports with *Atkins* and the Supreme Court's later opinions on the subject. We conclude

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[1] We will use the medical community's preferred term of "intellectually disabled" in place of "mentally retarded" except where the term is in quoted material.

that the courts in Ohio have unreasonably applied the Supreme Court's three-part standard in this case.

In its three cases on the subject of executing the intellectually disabled, the Supreme Court relies on two diagnostic manuals of the psychiatric profession to determine whether a defendant has an "intellectual disability"—*Intellectual Disability: Definition, Classification, and Systems of Supports*, the diagnostic manual published by the American Association on Intellectual and Developmental Disabilities, and the *Diagnostic and Statistical Manual of Mental Disorders* published by the American Psychiatric Association.[2] Both manuals require three separate findings before a diagnosis of intellectual disability is appropriate: (1) the individual exhibits significant deficits in intellectual functioning—indicated by an IQ score "approximately two standard deviations or more below the mean," or roughly 70; (2) the individual exhibits significant adaptive skill deficits—such as "the inability to learn basic skills and adjust behavior to changing circumstances"—in certain specified skill sets; and (3) the deficits arose while the individual was still a minor. *See Moore v. Texas*, 137 S. Ct. 1039, 1045 (2017); *Hall v. Florida*, 134 S. Ct. 1986, 1994-95 (2014); *Atkins*, 536 U.S. at 308 n.3.

The Ohio courts and the parties agree that Hill's IQ is so low (ranging from a low of 48 to a high of 71) that he easily meets the first element of the clinical

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[2] Prior to 2007, the American Association on Intellectual and Developmental Disabilities (AAIDD) was known as the American Association on Mental Retardation (AAMR).

definition of intellectual disability. They disagree, however, on the propriety of the state courts' holdings that Hill did not exhibit sufficient adaptive deficits under the second element and that Hill's deficits did not manifest themselves before Hill reached the age of 18. Therefore, we must resolve the dispute between the parties as to these two elements.

On the question of "adaptive deficits," we conclude that the Ohio courts have made the same basic mistake as the Texas courts in the recent case of *Moore v. Texas*, in which the Supreme Court reversed the death penalty because the Texas court incorrectly ruled that the prisoner's "adaptive strengths . . . constituted evidence adequate to overcome the considerable objective evidence of Moore's adaptive deficits." 137 S. Ct. at 1050. The Supreme Court rejected that view, noting that "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." *Id.* (emphasis in original) (citing AAIDD-11, at 47 (2010); DSM-5, at 33, 38 (2013)).[3] That view is consistent with the Court's previous observation that "intellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'" *Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) (quoting AAMR-10, at 8 (2002)). The case supporting a finding that Hill is intellectually disabled is even stronger than in *Moore*. Whereas Moore's intellectual functioning based on IQ was debatable, Hill's IQ is so

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[3] We will refer to the diagnostic manuals as "AAMR" or "AAIDD," and "DSM" followed by a number identifying the referenced edition.

low that the Warden concedes that Hill satisfies the first element of the definition.

We recognize that *Moore* was decided after the Ohio Court of Appeals rejected Hill's *Atkins* claim in 2008. *See State v. Hill*, 894 N.E.2d 108, 127 (Ohio Ct. App. 2008). Ordinarily, Supreme Court decisions that post-date a state court's determination cannot be "clearly established law" for the purposes of AEDPA. *Peak v. Webb*, 673 F.3d 465, 472 (6th Cir. 2012) (Under AEDPA, the "law in question must have been clearly established at the time the state-court decision became final, not after."). However, as discussed in more detail below, we find that *Moore's* holding regarding adaptive strengths is merely an application of what was clearly established by *Atkins*.

In light of the Ohio Court of Appeals' unreasonable determinations under both the adaptive-skills and age-of-onset prongs of the *Atkins* standard, we **REVERSE** the judgment of the district court and **REMAND** the case with instructions to grant the petition and to issue the writ of habeas corpus with respect to Hill's death sentence.

In addition to his *Atkins* claim, Hill raises an ineffective assistance to counsel claim that attacks his trial counsel's performance during his state *Atkins* hearing, a *Miranda* claim arguing that certain statements should have been suppressed during his trial, a prosecutorial misconduct claim, and a due process claim arguing that Hill was not competent to stand trial at the time of his convictions. For the reasons set forth below, we **AFFIRM** the district court's judgment denying Hill's habeas petition with regard to the latter three

claims, and pretermit the ineffective assistance of counsel claim regarding *Atkins* because we are granting relief on the merits of the *Atkins* claim.

I. Background

The facts and legal proceedings surrounding Hill's conviction and death sentence in 1986 are set out in our earlier opinion. *See Hill*, 300 F.3d at 681. Because this case centers on the issue of intellectual disability, what follows is an account of the facts and proceedings relevant to that question in this case.

Several evaluations conducted around the time of Hill's trial in 1986 reveal that Hill "has a diminished mental capacity," a fact acknowledged by the state court after Hill's *Atkins* hearing. *See Hill*, 894 N.E.2d at 112 (summarizing the testimonies of the three experts who testified during the mitigation phase of the initial trial that Hill was "mentally retarded"). Hill's IQ at the time of trial ranged from 55 to 68, and his moral development was "primitive"—essentially that of a two-year old. *Id.*

Hill has also demonstrated an "inability to learn basic skills and adjust [his] behavior to changing circumstances" since a very young age. *Hall*, 134 S. Ct. at 1994. Since his earliest days in school, Hill has struggled with academics. At the age of six, a school psychologist noted that Hill was "a slow learning child" and recommended that his teachers "make his work as concrete as possible" without "talking about abstract ideas." Warren Cty. School Psychologist's Report, dated Mar. 20, 1973. After kindergarten, Hill was placed into special education classes for the remainder of his time in the public school system. Hill struggled to keep up academically even in his special education classes and had difficulty

remembering even the simplest of instructions. At the age of 15, Hill could barely read or write. Those problems persist today. Indeed, prison records and testimony of prison guards indicate that the prison staff believed Hill to be illiterate, that he could not remember the balance on his commissary account and would often spend more money than was in his account, and that he could not perform even the most basic cleaning tasks without close supervision.[4] *See* Supp. *Atkins* App'x at 1325, 1483-86, 1510- 12, 1553, 1784.[5]

Hill has also been unable to take care of his hygiene independently from a young age. Hill's school psychologist recalled that, even as a kindergartener, Hill "had a problem with body odor and did not wear clean clothes to school." Decl. of

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[4] Some prison guards and officials testified in court or during interviews conducted by the experts that Hill properly accounted for the funds in his commissary account and filled out his own commissary forms, had no noticeable difficulties maintaining proper hygiene, and was of average abilities relative to his fellow death-row inmates. However, as will be discussed further below, both the Supreme Court and clinical guidelines "caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Moore*, 137 S. Ct. at 1050. Thus, while we do not ignore evidence in the record of Hill's seemingly improved adaptive functioning once he entered the highly regimented environment of death row, we find error in the state courts' overly emphasizing such evidence without also considering the contradictory evidence highlighted above and without acknowledging the diagnostic limitations associated with evaluating "improved behavior in prison." *See id.*

[5] The Supplemental *Atkins* Appendix can be found in the district court record at R. 97 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Apr. 30, 2010).

Karen Weiselberg-Ross, Warren Cty. School Psychologist ¶¶ 4, 12. During his time in a home for children with behavioral issues, Hill could not remember to comb his hair, brush his teeth, or take a shower without daily reminders. Mitigation Hr'g Tr. at 88, No. 85-cr-317 (Ohio Ct. of Common Pleas Feb. 26, 1986).[6] Even in the highly structured environment of death row, Hill would not shower without reminders.

The Supreme Court decided *Atkins* in 2002 while Hill's appeal from the district court's denial of his habeas petition was pending before this court. We remanded the case to the district court with instructions to remand Hill's unexhausted *Atkins* claim to the state court and to stay the remaining claims pending resolution of the *Atkins* claim. *Hill*, 300 F.3d at 683. After the case was returned to the state court, three experts—Drs. David Hammer, J. Gregory Olley, and Nancy Huntsman—examined Hill and testified over the course of several evidentiary hearings on Hill's *Atkins* claim.[7] Dr. Hammer was retained by Hill, Dr. Olley acted as the

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[6] The Mitigation Hearing Transcript can be found in the district court record at R. 31 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Jan. 28, 1997).

[7] As part of his *Atkins* evaluation, Hill was administered recognized standard tests measuring adaptive behavior by the three experts. The tests took place in a prison conference room. All three experts determined that the results of these tests were not reliable because Hill was "faking" the answers and in some instances did not complete the tests, instead breaking down in tears and claiming the tests were "too hard." As these tests were deemed unreliable, the experts were forced to base their assessments on their interactions with Hill and on interviews with prison guards. *See Hill*, 894 N.E.2d at 113.

state's expert, and Dr. Huntsman was appointed by the trial court. Dr. Hammer concluded that Hill met all three prongs for a diagnosis of intellectual disability. However, Drs. Olley and Huntsman concluded that Hill was not intellectually disabled. After considering the evidence presented on Hill's claim of intellectual disability, the state trial court denied Hill's petition for relief under *Atkins*, finding that Hill did not exhibit significant adaptive deficits and that any deficits he did have did not manifest before the age of 18. *State v. Hill*, No. 85-CR-317 (Ohio Ct. of Common Pleas Feb. 15, 2006) (unreported). The Ohio Court of Appeals affirmed the trial court over a dissent. *State v. Hill*, 894 N.E.2d 108 (Ohio Ct. App. 2008). The Ohio Supreme Court declined to review the case, with two justices dissenting. *State v. Hill*, 912 N.E.2d 107 (Ohio 2009) (table).

Hill then moved to reopen and amend his habeas petition in this case to include claims under *Atkins*. The district court denied Hill's amended petition in a thorough opinion, holding that the deferential standard of review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) mandated denial of Hill's habeas petition. *Hill v. Anderson*, No. 4:96-cv-00795, 2014 WL 2890416, at *51 (N.D. Ohio June 25, 2014). The district court denied Hill's petition despite its serious misgivings about the state court's rejection of the extensive record evidence that provided important diagnostic information regarding Hill's adaptive functioning and the age of onset of Hill's intellectual disability. *Id.* Ultimately, the district court believed AEDPA required acceptance of the state court's determinations that Hill did not exhibit sufficient

adaptive deficits and that Hill's disability did not manifest before the age of 18.

The district court was right to be skeptical of the state court judgment because it amounted to an unreasonable application of the standard articulated by the Supreme Court in *Atkins* and as later explained by *Hall* and *Moore*. Specifically, the state court's determination was unreasonable in two ways: First, the state court departed from the requirements of *Atkins* when it disregarded well-established clinical standards for assessing adaptive deficits by focusing on Hill's adaptive strengths instead of his adaptive deficits. Second, the trial court ignored clear and convincing evidence that Hill exhibited substantial deficits in both his intellectual and adaptive abilities since long before he turned 18.

II. Standard of Review

The parties dispute the proper standard of review for Hill's *Atkins* claims. Hill argues that we should review the state courts' determinations on adaptive deficits and age of onset as legal conclusions under 28 U.S.C. § 2554(d)(1), which would have us ask whether those decisions amount to an unreasonable application of the Supreme Court's precedents in *Atkins* and its progeny. The Warden argues that we should instead review those determinations as findings of fact under 28 U.S.C. § 2254(d)(2), which would require us to accept the state court's findings absent "clear and convincing evidence" to the contrary. 28 U.S.C. § 2254(e)(1).

We agree with Hill that the state courts' determination on adaptive deficits should be analyzed as a legal conclusion under 28 U.S.C. § 2254(d)(1) because it is merely the result of an

application of the standard articulated by the Supreme Court in *Atkins* and its progeny to the facts as found by the trial court. *See Van Tran v. Colson*, 764 F.3d 594, 626-27 (6th Cir. 2014) (holding that the "state court's application of Tennessee law with regard to whether [the defendant] is intellectually disabled under *Atkins* was contrary to clearly established federal law"); *Black v. Bell*, 664 F.3d 81, 100 (6th Cir. 2011) ("The rules governing what factors may be considered in determining whether a defendant qualifies as mentally retarded under *Atkins* deal with questions of law."); *Murphy v. Ohio*, 551 F.3d 485, 510 (6th Cir. 2009) (reviewing state courts' resolution of *Atkins* claim under 28 U.S.C. § 2554(d)(1)). As a result, our review under AEDPA consists of determining whether the state courts' conclusion that Hill did not exhibit deficits in two or more adaptive skill sets was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court judgment is the result of an unreasonable application of clearly established law for AEDPA purposes when the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 408-09 (2000).

However, we agree with the Warden that the state court's conclusion on the age of onset is better analyzed as a finding of fact under 28 U.S.C. § 2254(d)(2) as it is based entirely on an assessment of the evidence presented during Hill's evidentiary hearing. Accordingly, our review is limited to the question of whether the state court's finding that Hill's intellectual and adaptive deficits did not

manifest before the age of 18 amounts to "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). In making that assessment, we are mindful that AEDPA directs us to presume that facts decided by the state court are correct absent "clear and convincing evidence" to the contrary. 28 U.S.C. § 2254(e)(1).

III. Adaptive Deficits

Hill first disputes the Ohio court's finding that he did not exhibit "subaverage adaptive skills," reasoning that the state court's finding amounted to an unreasonable application of *Atkins* because the court's analysis on that point disregarded established medical practice. We agree and find that Hill has deficits in at least two adaptive skillsets under *Atkins*.

A. Standard for Assessing Adaptive Deficits

In *Atkins v. Virginia*, the Supreme Court held that the Eighth Amendment prohibits the execution of intellectually disabled individuals after identifying a "national consensus" against the practice from a survey of state legislation exempting the intellectually disabled from the death penalty. 536 U.S. at 314-17. The Court defined "mental retardation" by reference to two clinical definitions of the phrase: one from the American Association on Mental Retardation's *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992), and a second from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000). *Id.* at 308 n.3. Both definitions consisted of three independent elements: (1) significantly subaverage intellectual functioning,

(2) significant limitations in adaptive functions, and (3) the first two elements manifested themselves before the age of 18. *Id.*

Since *Atkins*, the Supreme Court has twice reaffirmed the centrality of clinical standards to the judicial inquiry regarding a defendant's eligibility for the death penalty. *Moore*, 137 S. Ct. at 1048-49; *Hall*, 135 S. Ct. at 2000. While it is true that the states retain some discretion to "develop[] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," *Atkins*, 536 U.S. at 317 (internal quotation and citation omitted), the Court has been clear that the states' discretion on that count is not "unfettered." *Moore*, 137 S. Ct. at 1048, 1052-53 (quoting *Hall*, 134 S. Ct. at 1998). Specifically, states' determinations on the question of whether an individual is intellectually disabled "must be 'informed by the medical community's diagnostic framework.'" *Id.* at 1048 (quoting *Hall*, 134 S. Ct. at 2000). When a court "disregards established medical practice" in assessing a criminal defendant's claim of intellectual disability, the error amounts to an unreasonable application of clearly established federal law. *Hall*, 134 S. Ct. at 1995, 2001; *see also Moore*, 137 S. Ct. at 1053.

Moore v. Texas clarified the "prevailing clinical standards" for assessing whether a criminal defendant possesses sufficient adaptive deficits to be constitutionally ineligible for execution. *Moore*, 137 S. Ct. at 1050-52. In *Moore*, the Texas Criminal Court of Appeals concluded that the prisoner did not exhibit sufficient adaptive deficits because he had previously "lived on the streets, mowed lawns, and played pool for money." *Id.* at 1050. The Court

rejected that approach and admonished courts not to "overemphasize[] [the defendant's] perceived adaptive strengths." *Id.* Instead, courts should follow "prevailing clinical standards," which "focus[] the adaptive-functioning inquiry on adaptive *deficits*." *Id.* (emphasis in original) (citing AAIDD-11, at 47 (2010) and DSM-5, at 33, 38 (2013)). The Supreme Court further noted "even if clinicians would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain, neither Texas nor the dissent identifies any clinical authority permitting the arbitrary offsetting of deficits against unconnected strengths in which the [Texas Court of Criminal Appeals] engaged." *Id.* at 1050 n.8. The Supreme Court also cautioned against "reliance on adaptive strengths developed 'in a controlled setting,' [like] prison" and pointed to clinical guidelines advising that strengths observed in prison should be compared to similar skills in general society whenever possible. *Id.* (citing DSM-5, at 38 (2013)).

Although they were decided after the state court decisions in this case, the primary holdings in *Hall* and *Moore* were compelled by *Atkins*. Both are illustrations of what was previously established by *Atkins*. *Harris v. Stovall*, 212 F.3d 940, 944 (6th Cir. 2000) ("'[C]learly established federal law as determined by the Supreme Court of the United States' means that the rule sought by petitioner must have been dictated or compelled by [existing precedent].").

Atkins itself looked to the consensus of the medical community as reflected in medical texts and treatises to define "intellectual disability." 536 U.S. at 308 n.3. In coming to its conclusion that the focus

of the adaptive-functioning inquiry should be on adaptive deficits and not strengths, the Supreme Court in *Moore* looked to the medical texts available to it, including the American Association on Intellectual and Developmental Disabilities (11th ed. 2010), and a second from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013). *Moore*, 137 S. Ct. at 1045. Neither of these editions cited by the Court would have been available at the time of Hill's *Atkins* hearing. However, the medical literature available in 2008 also required that the focus be on adaptive deficits rather than adaptive strengths. For example, the American Association on Mental Retardation defined "mental retardation" and then provided four assumptions "essential to the application of the definition," including that "[s]pecific adaptive limitations often coexist with strengths in other adaptive skills or other personal capabilities." AAMR-9 (1992). As mentioned above, this source was cited by the Supreme Court in *Atkins* in order to define intellectual disability. 536 U.S. at 308 n.3. Additionally, a later edition of the American Association on Mental Retardation's manual says that intellectually disabled persons may have "strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation." AAMR-10, at 8 (2002).

Consequently, the Ohio Court of Appeals was required by *Atkins* and the medical literature available to it in 2008 to assess whether Hill had adaptive skill deficits in two or more categories, and not to focus on Hill's adaptive strengths. Our use of *Moore* and *Hall* is limited to comply with AEDPA,

but our conclusion regarding what *Atkins* clearly established is buttressed by the Court's reasoning in *Hall* and *Moore*. In *Hall*, for instance, the Court stated that it "reads *Atkins* to provide substantial guidance on the definition of intellectual disability," 134 S. Ct. at 1999, and the Court determined that Florida had "misconstrue[d] the Court's statements in *Atkins*" in refusing to allow defendants to present evidence of intellectual disability if their IQ scores exceeded 70. *Id.* at 2001. And in *Moore*, the Court described the Texas Court of Criminal Appeals' "conclusion" that the defendant was not intellectually disabled as "irreconcilable with *Hall*." 137 S. Ct. at 1049. Such statements indicate that *Atkins* dictated the holding in *Hall*, and *Hall*, in turn, dictated the holding in *Moore*.

In addition, the *Moore* Court described a 2015 case—*Brumfield v. Cain*, 135 S. Ct. 2269 (2015)—as "relying on *Hall* to find unreasonable a state court's conclusion that a score of 75 precluded an intellectual-disability finding." 137 S. Ct. at 1049. Because *Brumfield* reached the Supreme Court on collateral review and the state post-conviction rulings on the defendant's *Atkins* claims preceded *Hall*, the Supreme Court's reliance on *Hall* in *Brumfield* makes clear that *Hall*'s principal holdings were compelled by *Atkins*. Finally, a recent decision by our court discussed *Hall* and *Moore* in reviewing a district court's denial of an *Atkins* claim, even though the district court's decision predated *Hall* and *Moore*. *Black v. Carpenter*, 866 F.3d 734, 744 (6th Cir. 2017). *Black* therefore corroborates this panel's conclusion that the holdings of *Moore* and *Hall* were required by *Atkins*.

B. Ohio Courts' Application of Atkins

Contrary to *Atkins*, the Ohio courts overemphasized Hill's adaptive strengths and relied too heavily on adaptive strengths that Hill exhibited in the controlled environment of his death-row prison cell. In so doing, they unreasonably applied clearly established law.

Ohio has adopted the three-prong standard set forth in *Atkins* for evaluating a claim of intellectual disability. *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002). In *Lott*, the Supreme Court of Ohio specifically approved the definition of intellectual disability set forth in the then-current editions of the diagnostic manuals. *Id.* at 1014. Applying the standards in those manuals, individuals had significant limitations in adaptive skills if they exhibited deficits in at least two of the following ten areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.[8]

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[8] The later editions of the AAIDD Manual have moved away from this scheme of categorization, instead forming three "clusters" of related skills and requiring a significant limitation in one of those broader domains.

"Conceptual" skills include language skills, reading and writing abilities, self-direction, and grasping concepts of money. These conceptual skills may be collectively labeled as functional academics. "Social" skills focus on interpersonal relationships, responsibility, self-esteem, gullibility/naïveté, following rules/obeying laws, and avoidance of victimization. "Practical" skills focus on self-care and daily living. Such skills include preparing and eating meals, dressing, toileting, personal mobility and use of transportation, occupational skills, health care, and maintenance of safe environments.

In this case, the Ohio appellate court correctly set forth the three-prong *Atkins* standard as adopted by the Ohio Supreme Court in *Lott*. It also correctly noted that the second criterion under *Lott* requires the defendant to demonstrate "significant *limitations* in two or more adaptive skills, such as communication, self-care, and self-direction." *Hill*, 894 N.E.2d at 113 (emphasis added). The Ohio court then veered off track when it disregarded the prevailing clinical practice documented in the medical literature by placing undue emphasis on Hill's adaptive strengths, as opposed to his adaptive weaknesses, and by relying too heavily on the observations of prison guards concerning Hill's behavior in the highly regimented environment of his prison block. *Id.* at 124-25.

1. The Ohio Courts Inappropriately Focused on Hill's Adaptive Strengths

The Ohio courts' conclusion that Hill did not demonstrate significant limitations in two or more adaptive skill areas was the result of an inappropriate focus on Hill's adaptive strengths instead of the constitutionally required analysis of Hill's adaptive weaknesses. In determining that "Hill's adaptive skills are inconsistent with a mentally retarded individual," the state trial court focused extensively on Hill's interview with a reporter, his demeanor in interacting with law enforcement and the legal system, and the circumstances surrounding the Fife murder. *State v. Hill*, slip op. at 73-77. Those supposed adaptive strengths convinced the state trial court that Hill could not be intellectually disabled because he had "remarkable" communication and vocabulary skills

and was self-directed. *Id.* at 74. Even assuming the truth of those findings—though there is substantial evidence in the record to contradict them—they demonstrate only that communication and self-direction may be some of Hill's strengths, and "prevailing clinical standards" hold that such strengths cannot be used to discount demonstrated weakness in other areas of adaptive functioning. *Moore*, 137 S. Ct. at 1050. Even cursory analysis of the evidence from the *Atkins* hearing reveals that Hill has had consistent and significant limitations in at least two identified areas of adaptive functioning—functional academics and hygiene/self-care—since childhood. The record also supports finding limitations in two additional areas—social skills and self-direction.

With respect to functional academics, Hill was considered "mentally retarded" by the Warren City Schools. He was diagnosed as mildly mentally retarded, "trainable mentally retarded," or "educable mentally retarded" several times before he turned 18, beginning with the recognition that he was a "slow learning child" when he began formal schooling at age 6. He scored below 70 on every IQ test administered during his school years. He attended special education classes for the entirety of his school career, which meant that all of his academic classes were taught at a very basic level. He was "mainstreamed" only in physical education and music, and struggled even there to keep up with and socialize normally with his peer group. There is no record of him taking "mainstream" classes in any academic subject area, i.e., math, reading, or history. At age thirteen, he was sent to a school for intellectually disabled children, and was transferred

to another, similar school at fifteen because of poor academic achievement and behavior. At seventeen years old, after being arrested for, and pleading guilty to, two felony rape charges, the juvenile court placed Hill in a facility that housed youth offenders with mental disabilities or emotional problems. There, Hill completed ninth grade in special education classes at age 18. After being released, he returned to high school, but Fife's murder occurred six months later.

At age six, Hill did not know his age, but thought he was nine. His reading and verbal skills were at the five-year-old level and he had a mental age of four years and six months. At age 8 and 8 months, Hill was considered functioning at a "high kindergarten level." At age 13, he was functioning at the "mid-2nd grade level" in reading and the "mid-1st grade level" in arithmetic. Also when Hill was 13-years-old, a school psychologist set out "special instructional recommendations" that included teaching Hill his address and phone number, as well as how to tell time. He exhibited weaknesses in reasoning ability, originality, verbal interaction, and a lack of intellectual independence. By 14, he was reading at a first-grade level and his math skills were at a third-grade level, and he still had not mastered writing his own signature. His teacher was working on self-control skills that would generally be mastered by a kindergarten student, including "working without being disruptive" and not touching other students inappropriately. Teachers set academic objectives like learning to: tell time in five-minute intervals; write his own signature; shower regularly; put soiled clothing in the appropriate place; and eat and drink in a manner appropriate in

a school setting. Hill was described as hyperactive and needing to complete tasks "one step at a time."

The record also demonstrates that Hill was deficient in hygiene and self-care. At the age of 14, he still needed to be told to shower regularly, brush his teeth, and apply deodorant every day. He would not independently follow through and take care of his hygiene unless he was told to do so. At approximately age 16, a group home officer noted that although Hill was "improving in his personal hygiene," he still "need[ed] constant reminder[s] to shower, brush his teeth, etc.[.]" Hill continued to have problems with his hygiene in prison and had to be reminded frequently to groom himself.

The record also demonstrates Hill had limitations in the area of social skills. For example, the district court pointed to the testimony of psychologists who spoke to Hill's "poor self-esteem, inability to interpret social situations and create positive relationships, and [the fact] that he was easily influenced by people, gravitated toward an antisocial peer group, and did not respond appropriately to authority figures." *Hill*, 2014 WL 2890416, at *38. Hill's school and court records demonstrate that he had trouble making friends. At 17, Hill was described as "socially constricted" and possessing "very few interpersonal coping skills."

Hill also showed limitations in at least one more area—self-direction. Hill was described as "easily led" in both his school and court records, and from periods both before and after he committed serious crimes while apparently acting alone. In school, Hill was described as immature and "easily led by others into trouble around school," like fighting. He was

vulnerable to exploitation by older individuals, displayed inappropriate and immature behaviors in class, rarely considered the consequences before acting, and had trouble conforming his behavior to the rules or the law. When Hill was 13, he was described as exhibiting a "great deal of impulsivity." When Hill was 17, he was evaluated by a psychologist who concluded that he had poor judgment, "d[id] not think of consequences," was "highly suggestable," and "was 'likely to be exploited'" if placed in halfway home for adults "because of his 'passivity and limited intellectual ability.'" Another report from that same time expressed concern about his tendency to follow others.

In addition to his significant limitations in functional academics, self-care, social skills, and self-direction, the record also demonstrates that Hill has never lived independently, never had a driver's license or a bank account, never been able to perform a job without substantial guidance from supervisors, was labeled "functionally illiterate" at school and in prison, could never read or write above a third-grade level, and could never adequately sign his own name.

In sum, the record is clear that Hill was universally considered to be intellectually disabled by school teachers, administrators, and the juvenile court system, and that those same authorities documented deficits in several adaptive skills areas. Hill consistently performed very poorly in school (functional academics); there was consistent documentation that he had trouble maintaining proper hygiene despite reminders (self-care); he had trouble making friends and responding appropriately

to authority figures (social and communication); and he was described as a follower, easily led, and vulnerable to exploitation by adults (self-direction). The record shows that these deficits largely continued into adulthood, particularly with respect to self-care and functional academics. When these facts are applied to the clinical standards articulated by the Supreme Court in *Atkins* and by the Supreme Court of Ohio in *Lott*, they overwhelmingly indicate that Hill had significant limitations in at least two, and probably four, adaptive skill areas. Any apparent strengths are not relevant to the inquiry.

The Ohio court's finding to the contrary does not comport with the clinical guidelines ratified by the Supreme Court for assessing adaptive deficits. Hill's ability to communicate effectively and to direct his actions to a specified goal does not mean that he did not have significant limitations in other adaptive skill areas. Instead of marshalling facts in opposition to the clear conclusion from the record evidence that Hill had significant limitations in at least functional academics and self-care, the Ohio court rested its conclusion on Hill's relative strengths in communication and self-direction. And even within those two areas, the Ohio courts failed to grapple with the evidence in the record indicating that Hill's perceived strengths were actually weaknesses.

To the extent the Ohio courts addressed evidence in the record pointing to adaptive deficits, they turned to inapposite or irrelevant facts to "arbitrar[ily] offset[]" such evidence of deficits—a practice *Moore* expressly rejects. *See* 137 S. Ct. at 1050 n.8 ("[E]ven if clinicians would consider adaptive strengths alongside adaptive weaknesses

within the same adaptive-skill domain, neither Texas nor the dissent identifies any clinical authority permitting the arbitrary offsetting of deficits against unconnected strengths in which the [Texas Court of Criminal Appeals] engaged."). For instance, the state trial court discounted evidence of Hill's "consistently poor" academic performance by pointing to evidence in the record that Hill was "a healthy boy described frequently by his teachers as lazy, who admits to experimenting with drugs and alcohol, who assaults the defenseless, steals frequently and lies a lot," and who, by age 18, could "write in cursive, but prefer[red] to print." *Hill*, slip op. at 70. The trial court then pointed to a teacher's note, written in October 1981, describing Hill as "a bright, perceptive boy with high reasoning ability." *Id.* The Ohio appellate court summarized the evidence regarding Hill's childhood academic performance in similar terms, stating that "Hill's public school records amply demonstrate a history of academic underachievement and behavioral problems," and noting that he "was described by at least one of his special education teachers as 'a bright perceptive boy with high reasoning ability.'" *Hill*, 894 N.E.2d at 124. The court also noted that while there "are references to Hill's being easily led or influenced by others, the trial court noted that much of Hill's serious misconduct, including two rapes committed prior to Fife's murder, occurred while he was acting alone." *Id.*

The problems with the courts' analyses of Hill's academic performance are manifold. As the district court noted, "the court's finding that Hill 'underachieved' academically or in any other adaptive skill as a child is squarely contradicted by

the record. This Court could not find one reference in Hill's school records by a teacher, school administrator, psychologist, psychiatrist, or anyone else suggesting that Hill was capable of performing at a substantially higher level but chose not to.'" *Hill*, 2014 WL 2890416, at *26. And as clinical guidelines have long recognized—and as the experts in this case testified—evidence of behavioral problems or a conduct disorder simply does not undermine a simultaneous finding of intellectual disability. *See Atkins* Hr'g Tr. at 475 (Hammer test.); *id.* at 959-60 (Huntsman test.); *id.* at 573 (Olley test.) ("[I]f he's having conduct problems in school, that's neither here nor there to a diagnosis of mental retardation."). The courts incorrectly discounted the fact that Hill was easily led because he committed crimes on his own. Under prevailing medical standards, however, Hill's prior criminal behavior should not be given weight in this analysis. Finally, the Ohio courts' focus on a note drafted by a teacher *in a school for intellectually disabled children* describing Hill as "'bright' and 'perceptive,' with 'high reasoning ability'" was, as the district court put it, "almost cynical in its selective misrepresentation of the facts." *Hill*, 2014 WL 2890416, at *27. Throughout its opinion, the district court referred to certain findings and inferences by the Ohio courts as "troubling," "irrelevant," "problematic," and "squarely contradicted by the record." *Id.* at **24-27.

The Ohio courts' handling of evidence regarding self-care is equally troubling. The Ohio Court of Appeals' sole reference to Hill's deficits with regard to self-care was its summary of testimony provided by a prison official "that Hill's self-care was 'poor but not terrible' and that Hill had to be reminded

sometimes about his hygiene." *Hill*, 894 N.E.2d at 125. Such a statement downplays the record's extensive chronicling of Hill's struggles with hygiene, including the fact that an individual education plan established for Hill when he was nearly fourteen years old included an "[a]nnual [g]oal and [o]bjective" of helping Hill "learn to shower when necessary" and to "put soiled clothing in the appropriate place." *Aikins* Hr'g Tr. at 147, 193 (Hammer test.).

The state trial court also unduly relied on Hill's "initiative in coming to the police" after Fife's death, as well as his alleged efforts to misdirect the investigation and fabricate an alibi while under interrogation, as "evidence of Hill's ability concerning self-direction and self-preservation." *See Hill*, 2014 WL 2890416, at *33. As the district court noted, "'[s]elf- preservation' is not among the adaptive skills measured under the clinical definitions of intellectual disability," and "self-direction" covers a host of behaviors—including "initiating activities appropriate to the setting" and "demonstrating appropriate assertiveness and self-advocacy skills"—either unrelated or directly contrary to Hill's decision to make contact with the police. *Id.* Contrary to the Ohio courts, the district court found Hill's "performance" during the police interrogation revealed him to be "childlike, confused, often irrational, and primarily self-defeating," and characterized Hill's attempts to change his story under pressure as failing to "skillfully hid[e] his part" in Fife's death. *Id.* at *34. These actions were "quite the opposite of adaptive." *Id.* This is especially true where Hill's decision to approach the police did not "resolve his problems," but "succeeded only in

immediately drawing the police's attention to himself." *Id.*

Hill's behavior during questioning also undermines the conclusion that he had strengths in self-direction. For example, Hill often changed his story or embellished his statements "at the slightest suggestion by the po'ice, even when the information at issue was irrelevant or incriminating." *Id.* at *35. While the Ohio court focused on what it saw as Hill's abilities in the area of "self-direction" from around the time of the crime, it also ignored other evidence from around the same time illustrating that Hill had adaptive deficits. For example, at Hill's mitigation hearing, three psychologists testified that Hill was intellectually disabled at that time and had extremely poor adaptive functioning. On appeal, the Ohio Supreme Court and Court of Appeals found these psychologists' testimony credible and concluded that Hill was disabled. *See State v. Hill*, 595 N.E.2d 884, 901 (Ohio 1992); *State v. Hill*, Nos. 3720, 2745, 1989 WL 142761, at **6, 32 (Ohio Ct. App. Nov. 27, 1989).

It is true, of course, that the state trial court expressly "relie[d] upon the expert opinion of Drs. Huntsman, Hancock and Olley to conclude" that Hill had failed to demonstrate adaptive deficits. *Hill*, slip op. at 81. We have previously denied *Atkins* relief in an AEDPA case arising out of Ohio where, as here, two of the three mental health experts testified that the petitioner was not intellectually disabled. *O'Neal v. Bagley*, 743 F.3d 1010, 1023 (6th Cir. 2013) ("With expert testimony split, as it often is, the state court chose to credit Dr. Chiappone and Dr. Nelson over Dr. Tureen, and we cannot say from this vantage

that it was unreasonable to do so."). However, *O'Neal* is distinguishable on its facts and Hill's claim for *Atkins* relief is much stronger than the petitioner's claim in *O'Neal*. For example, in *O'Neal* there was insufficient evidence to prove that the petitioner met the first prong in demonstrating "significantly subaverage intellectual functioning." *Id.* at 1022. Here, by contrast, Hill's IQ is so low that the Warden concedes that Hill satisfies the first prong. Additionally, O'Neal's claim for *Atkins* relief also failed because his adaptive deficits may well have been better explained by his drug abuse and personality disorder rather than organic mental illness. *Id.* at 1022-23.

Even though *Atkins* requires that determinations regarding intellectual disability be informed by the medical community, as discussed above, the Ohio courts should have rejected the expert testimony in this case. Requiring courts to be "informed by the medical community's diagnostic framework," *Moore*, 137 S. Ct. at 1048 (quoting *Hall*, 134 S. Ct. at 2000), does not authorize courts to tether their decisions to expert opinions that depart from that "diagnostic framework." As Dr. Olley recognized, and as the clinical guidelines make clear, "the AAMR manual specifically says you would expect that individual[s] would have some relative strengths and some relative weaknesses." *Atkins* Hr'g Tr. at 557 (Olley test.). And yet neither Dr. Olley nor Dr. Huntsman appeared to apply this crucial aspect of the clinical guidelines in assessing Hill's adaptive deficits.[9]

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[9] Dr. Hancock, the third expert on whom the state trial court expressly relied, did not assess Hill's adaptive deficits. Instead, he was called upon "to review the test equating method

Consequently, many of the same criticisms we have of the trial court's analysis of Hill's *Atkins* claim apply equally to Dr. Olley's and Dr. Huntsman's testimony.

Dr. Huntsman's report focuses almost exclusively on Hill's perceived adaptive strengths—his "remarkable memory for the history of his case," his detailed and "very complex explanation for how Raymond Fife came to be killed," and the "competencies" observed by staff members in prison. Supp. *Atkins* App'x at 1141. (Huntsman Report at 16.) Her testimony at the *Atkins* hearing was no different. *Atkins* Hr'g Tr. at 907 ("[I]t's my opinion that he clearly demonstrates behavioral *capacities* that are beyond retarded level.") (emphasis added). Dr. Olley's report and testimony suffer the same defects. *See* Supp. *Atkins* App'x at 1125 (Olley Report at 8) ("The available information on Mr. Hill's current functioning does not allow a diagnosis of mental retardation . . . . Mr. Hill's memory was very good in court on April 15, 2004, when he provided details of events. In [an] interview during this evaluation, Mr. Hill showed good memory of 20-year old events and the ability to express a complex explanation of the crime in order to support his claim of innocence."); *Atkins* Hr'g Tr. at 586 (defending his opinion, in part, because of the way in which Hill exhibited "a kind of thinking and planning and

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used [by yet another expert, Dr. Sara Sparrow, whose opinion Hill wished the court to consider] to interpret scores in adaptive behavior testing of Danny Lee Hill and to examine other psychometric issues that may affect appropriate diagnostic process in the case." Supp. *Atkins* App'x at 3093. (Hancock Supp. Report at 1.)

integrating complex information that is a higher level than I have seen people with mental retardation be able to do").

In short, Drs. Olley and Huntsman adopted precisely the sort of analysis the Supreme Court has foreclosed. Courts cannot bypass the Supreme Court's clear instruction not to "disregard[] established medical practice," *Hall*, 134 S. Ct. at 1995, by relying on experts who have done just that. Consequently, it was unreasonable under the circumstances of this case for the Ohio courts to rely on Dr. Olley's and Dr. Huntsman's expert opinions in finding that Hill was not intellectually disabled. The state courts' failure to consider adequately Hill's adaptive deficits amounts to a sufficiently unreasonable application of the Supreme Court's decisions in *Atkins*, *Hall*, and *Moore* to warrant issuance of the writ.

2. The Ohio Courts Gave Undue Weight to Hill's Behavior in Prison

Although the Ohio courts' reliance on Hill's adaptive strengths without addressing the overwhelming evidence of his weaknesses in the areas of functional academics and self-care would be enough to justify issuance of the writ, we also hold that the Ohio courts unreasonably applied clearly established law by placing undue weight on a criminal defendant's behavior in prison when assessing his or her adaptive skills.

As mentioned above, *Atkins* drew from the consensus of the medical community as reflected in medical texts and treatises to define intellectual disability. 536 U.S. at 308 n.3. The medical literature available in 2008 prohibited the assessment of

adaptive skills in atypical environments like prison. For example, the 2002 American Association on Mental Retardation says "[l]imitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture." AAMR-10, at 8. It continues: "This means that the standards against which the individual's functioning must be measured are typical community-based environments, not environments that are isolated or segregated by ability." *Id.* As the district court correctly noted, "death row is a segregated, highly structured and regulated environment" and reliance on Hill's prison records is problematic because they evaluate Hill's adaptive skills against those of other inmates on death row. *Hill*, 2014 WL 2890416, at *42.

Further, the district court noted that the weight of the testimony from various death row prison officials was limited by their potential bias against the inmates they were charged with guarding, as well as the shortcomings affecting lay opinions about intellectual disability generally. *Id.* at **42-43. And in any event, as the district court noted, many of the prison officials' statements were "rife with contradictions, with themselves and each other." *Id.* at *43.

Assessing Hill's adaptive deficits as an adult is particularly challenging given the absence of any reliable testing to measure Hill's adaptive functioning and the lack of reliable evidence of how Hill would have functioned as an adult in general society as he has been incarcerated for all but six months of his adult life. Evidence of adaptive functioning in this kind of controlled setting is of

limited value because inmates do not have the same opportunities to acquire new skills or show weaknesses in existing skills. Given the lack of evidence regarding Hill's likely adaptive performance as an adult in the general community, the Supreme Court and established clinical guidelines require consideration of all available evidence. Specifically, the testimony of prison guards who have known Hill only in a correctional setting should lead the court to treat their observations with a degree of skepticism. *United States v. Hardy*, 762 F. Supp. 2d 849, 899-900 (E.D. La. 2010) ("An institutional environment of any kind necessarily provides 'hidden supports . . . .'") (citing AAIDD-11, at 45 (2010)).

Here, the state court assessed Hill's adaptive skills almost exclusively by reference to the testimony of prison guards about Hill's behavior in a "controlled" prison environment, without mention of documentary evidence of Hill's deficits in a number of adaptive skill areas both before and after his incarceration. It did not mention any review of prison records, which reflect that prison officials always recognized Hill to be mentally incapacitated or "slow." As when he was in school, Hill was considered to be illiterate in prison. He was understood to have a "very limited writing ability," and he had other inmates write for him. Notes written from Hill to prison officials make clear that he had trouble keeping track of his prison account balance. According to fellow inmates, when Hill was given a task, he had to be carefully supervised because he could not remember how to complete the assigned task. At least one prison official reported that Hill was able to perform his job as a porter because the

cleaning supplies were sorted by color, so Hill was not required to read the supplies' instructions.

The state courts' emphasis of and reliance upon prison guard testimony about Hill's behavior in prison without consideration of record evidence suggesting Hill had significant limitations even in the "controlled setting" of his cell block goes against both the Supreme Court's precedent and long-established clinical practice. That error compounds the trouble with the state court's emphasis of Hill's strengths without independent consideration of his adaptive weaknesses because much of the evidence supporting the court's finding of Hill's adaptive strengths was based on observations of and testimony about Hill's behavior in a "controlled setting" as opposed to in the general community. Because that analysis disregards prevailing clinical standards, it amounts to an unreasonable application of the Supreme Court's decisions in *Atkins*, *Hall*, and *Moore*.

Because "[t]he medical community's current standards supply one constraint on States' leeway" in defining who is "intellectually disabled," the Ohio courts were not free to disregard the medical consensus on the appropriate standard for assessing whether Hill exhibited adaptive deficits. *Moore*, 137 S. Ct. at 1053. Application of the correct standard to the record evidence overwhelmingly supports the conclusion that Hill exhibited substantial deficits in at least two adaptive skillsets; consequently we disregard the state court's determination because it was the result of an unreasonable application of "clearly established Federal law, as determined by

the Supreme Court of the United States" under 28 U.S.C. § 2254(d)(1).

IV. Age of Onset

We also reject the state court's finding that Hill's intellectual and adaptive deficits did not manifest themselves prior to the age of 18 because clear and convincing evidence suggests otherwise. *See* 28 U.S.C. § 2254(e)(1). In fact, as noted above, Hill's disability was extensively documented before he turned 18 because he spent all of his school years in programs for the intellectually disabled and the juvenile justice system. The record is replete with comments from teachers concerning Hill's lagging academic performance, his poor memory, his lack of personal hygiene, his immature and inappropriate behavior in relation to his peers, and his tendencies as a follower. *Hill*, 894 N.E.2d at 128-29 (O'Toole, J., dissenting). In addition to school records, the state court record contains testimony to similar effect from several staff members at a halfway house in which Hill resided as a teenager, as well as a counselor at the juvenile correction facility where he was placed.

All the of these significant adaptive skill deficits manifested themselves before Fife was killed in 1985 and, as noted by the experts, there was no reason to suspect that Hill was malingering as a child despite his apparent malingering on the assessments administered in April 2004. The records cover the time frame from 1973 to 1984, six months before the murder for which Hill was sentenced to death, and 20 to 30 years before the Supreme Court decided *Atkins*. Hill could not have been faking intellectual disability to avoid the death penalty. Accordingly, we reverse the state courts' conclusion on the age-of-

onset prong as it is contradicted by clear and convincing evidence.

We recognize, of course, that state court determinations of fact are entitled to a great deal of deference. But "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Rather than address the abundant evidence in the record of Hill's adaptive deficits as a child and teenager, the state trial court focused on his ability to engage in "a one-man crime spree at the age of 17" and his ability to "hold his own during police interrogation of the Fife murder." *Hill*, slip op. at 82. In so doing, the trial court inappropriately focused on perceived adaptive strengths, ignored clinicians' warnings not to conflate criminal behavior with adaptive functioning, *see, e.g.*, *Atkins* Hr'g Tr. at 208-09 (Hammer test.), and failed to acknowledge that Hill's performance during the police interrogations was, in the words of the district court, "childlike, confused, often irrational, and primarily self-defeating." *Hill*, 2014 WL 2890416, at *34. In a three-sentence summary, the state appellate court affirmed the trial court's findings. *Hill*, 894 N.E.2d at 126. Such selective reliance on mostly irrelevant pieces of evidence to find that Hill lacked adaptive deficits before the age of 18 constitutes "an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2).

Consequently, we conclude that the state court's finding that Hill's intellectual and adaptive deficits did not manifest before the age of 18 amounts to "an

unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).[10]

V. Suppression of Pretrial Statements to the Police

In addition to challenging his eligibility for the death penalty after *Atkins*, Hill raised several challenges to his conviction in his habeas petition. Because we remanded his case to the state court after *Atkins* was decided in 2002, we did not reach the merits of those claims. *Hill v. Anderson*, 300 F.3d 679 (6th Cir. 2002). We do so now and **AFFIRM** his conviction.

Hill contends that the Ohio courts unreasonably applied clearly established federal law in determining that Hill's statements to police were admissible. Hill maintains that his statements were "involuntary and false" because: his intellectual disability made him especially vulnerable to police coercion; his intellectual deficiencies were known by the police, including interrogators Sergeant Thomas Stewart, Sergeant Dennis Steinbeck, and his physically abusive uncle, Detective Morris Hill; the police made statements to Hill that led him to believe that denying guilt was "hopeless"; and Hill lacked the intellectual capacity to understand the legal consequences of the statements he made (and the police recorded) while he was at the Warren police station.

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[10] As we have decided the merits of Hill's *Atkins* claim in his favor, we pretermit discussion of Hill's claim of ineffective assistance of counsel during his *Atkins* proceedings in state court.

Because the Ohio courts rejected this claim on the merits as part of Hill's direct appeal, *see Hill*, 595 N.E.2d at 890-91; *Hill*, 1989 WL 142761, at **5-8, Hill must show that the state courts' decisions involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. *See* 28 U.S.C. § 2254(d)(1). "[A]n unreasonable application of th[e Supreme Court's] holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (citation and quotation marks omitted).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that "[a] suspect in custody must be advised . . .[,] 'prior to any questioning[,] that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010) (quoting *Miranda*, 384 U.S. at 479). This holding was necessitated by the Supreme Court's acknowledgement that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be accorded his privilege under the Fifth Amendment not to be compelled to incriminate himself." *Dickerson v. United States*, 530 U.S. 428, 434-35 (2000) (citation, quotation marks, and ellipses omitted). Thus, "[w]hen police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that

they be excluded from evidence at trial in the State's case in chief." *Oregon v. Elstad*, 470 U.S. 298, 317 (1985); *see also Lego v. Twomey*, 404 U.S. 477, 487-88 (1972) ("[*Miranda*] excludes confessions flowing from custodial interrogations unless adequate warnings were administered and a waiver was obtained.").

In this case, it is undisputed that Hill was given *Miranda* warnings and signed a waiver prior to making the recorded statements that he sought to suppress at trial. Hill's challenge, then, is to the validity of that waiver. He argues that because his waiver was not knowing, intelligent, and voluntary, it was invalid.

A suspect may waive his *Miranda* rights only if "the waiver is made voluntarily, knowingly and intelligently." *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (citation and quotation marks omitted).

> The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation [reveals] both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id. (citations and quotation marks omitted). For a waiver to be knowing and intelligent, the suspect must be "fully advised of [his] constitutional

privilege[s]." *Colorado v. Spring*, 479 U.S. 564, 574 (1987). To be voluntary, a confession may not be "the product of coercion, either physical or psychological." *Rogers v. Richmond*, 365 U.S. 534, 540 (1961). However, "[p]loys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns." *Illinois v. Perkins*, 496 U.S. 292, 297 (1990); *see, e.g.*, *Oregon v. Elstad*, 470 U.S. 298, 317 (1985) ("[T]he [Supreme] Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily.") (citation omitted).

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary . . . .'" *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Although a suspect's mental condition may be a "significant factor in the 'voluntariness' calculus," that "mental condition, by itself and apart from its relation to official coercion, should [n]ever dispose of the inquiry into constitutional 'voluntariness.'"[11] *Id.* at 164.

On December 16, 1985, the Ohio state trial court held a hearing on Hill's motion to suppress his audio-

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[11] Under Supreme Court precedent, a person who meets the standard for intellectual disability may not be executed. As discussed extensively above, we find that Hill is intellectually disabled and is entitled to have the writ issue with respect to his sentence. However, the requirements for determining whether someone is intellectually disabled under *Atkins* and *Lott* are different from the requirements for determining whether a waiver is knowing and voluntary under *Miranda*. And a person who is intellectually disabled may still be able to knowingly and voluntarily waive his *Miranda* rights.

and video-taped statements to the police.[12] At the suppression hearing, witnesses testified to the following facts.

On September 12, 1985, two days after Fife was attacked, Hill went to the Warren Police Department and approached Sergeant Stewart to talk about that "boy being beat up in the field." R. 28, PageID# 2748-49. Stewart, who was a friend of Detective Hill and had known (Danny) Hill since he was approximately six years old, agreed to talk to Hill in the "Narcotics Room." *Id.* at 2750-51, 2782. Stewart testified that Hill had come to the police station voluntarily, i.e., that no one had "brought him in," and Hill's testimony corroborated this assertion. *Id.* at 2751; R. 29, PageID# 3130.

Once in the Narcotics Room, Hill told Stewart that he had seen another boy, Reecie Lowery, riding the bike of the boy "who was beat up." R. 28, PageID# 2751-52. When Stewart asked Hill, "How do you know it's the boy's bike?", Hill responded, "I know it is." *Id.* at 2752. Hill then told Stewart about the bike's location and encouraged Stewart to "go out and get the bike" before Lowery put it back in the wooded field where Fife was attacked. *Id.* After Hill told Stewart that he was willing to show him where the bike was located, Stewart and Hill began talking about various persons, including Tim Collins and Tim Combs (Hill's co-defendant). Hill insinuated that both Collins and Combs liked boys and might have

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[12] The transcript of the suppression hearing can be found in the district court record at R. 28 and R. 29 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Jan. 28, 1997). Because the pagination in the original transcript is unclear, we will cite to the pagination used by the district court.

been the ones who attacked Fife. At some point during their talk, Hill mentioned that Fife was choked with his underwear. *Id.* at 2756-57.

Eventually, Stewart drove Hill to look for the bike, but because it was raining and visibility was poor, Stewart and Hill did not go to the wooded field. Instead, Hill showed Stewart where Combs lived. *Id.* at 2753-54. After dropping Hill off at his house, Stewart compiled a report that he shared with his fellow officers, including Sergeant Steinbeck. *Id.* at 2755, 2757-58.

The next day, September 13, 1985, Steinbeck went to Hill's home around 9:30 or 10:00 in the morning to follow-up on the information that Hill had given to Stewart. Steinbeck asked Hill to come talk to him at the police station and Hill agreed. *Id.* at 2762-63, 2881. Hill was driven to the police station in the front seat of Steinbeck's police cruiser and was not booked, fingerprinted, or placed under arrest. Steinbeck read Hill his *Miranda* rights aloud, asked Hill if he understood those rights, and had Hill sign a waiver of his *Miranda* rights before questioning Hill off and on for approximately three hours. *Id.* at 2863-64, 2882-84. During those three hours, Hill never asked for the questioning to stop, tried to leave, or asked to see an attorney. *Id.* at 2865-66, 2885-89. After talking to Hill, Steinbeck transcribed a copy of Hill's statement, which also included a recital of his *Miranda* rights. However, Hill did not sign the statement that day because Steinbeck had forgotten to ask him to do so after telling Hill he could go home with his mother. *Id.* at 2866-69, 2889-90.

On September 16, 1985, both Steinbeck and Detective Hill went to Hill's home; ostensibly to ask

Hill to sign his statement from September 13 and to ask Hill's mother for a written statement regarding Hill's alleged alibi. After putting up some initial resistance to speaking to the police again, Hill, at the behest of his mother, agreed to come down to the police station, this time accompanied by his mother. Hill was not placed under arrest, booked, fingerprinted, or handcuffed. *Id.* at 2869-70, 2890-92, 2899-2901, 2930-32.

In the interrogation room, and apparently separated from his mother, Hill was verbally advised of his *Miranda* rights by Detective Hill. *Id.* at 2871, 2901-02, 2933. Hill indicated that he understood his rights. *Id.* at 2902. Although not initially present, Sergeant Stewart eventually encountered Sergeant Steinbeck and Detective Hill in the interrogation room with (Danny) Hill. *Id.* at 2758, 2872, 2908. At some point, officers told Hill they did not believe he was telling the truth, and Stewart told Hill that he needed to be honest if he had "anything to do with [Fife's murder]." *Id.* at 2872, 2909-10. Officers also told Hill that it would "benefit him" to tell them the truth, believing that Combs would likely blame the attack on Hill alone. *Id.* at 2909.

Apparently at Hill's request, Detective Hill was left alone with his nephew. According to (Danny) Hill, while he and Detective Hill were alone, Detective Hill "threw [him] against the wall," slapped him across the face, and told him that he "better tell" the police what happened. *Id.* at 2759, 2810-11, 2859, 2910, 2936-37, 2953. Hill also testified that his uncle kicked him under the table in order to prompt Hill to (1) consent to his statement being

taped and (2) begin talking to police at the beginning of the taping.

Detective Hill, unsurprisingly, described the time he spent alone with his nephew very differently, testifying:

> At that point in time, you know, I set [sic] there, and I tried to let Danny know that wasn't anyone [sic] going to hurt him. No one was going to do anything to him, but [I also told him] the fact that I kn[e]w that he was involved in the homicide, and I wanted to get the truth out of him. At that point in time, he looked at me and tears started to come from his eyes. When tears started coming from his eyes, he told me . . . , "I was there. I was in the field when he got murdered." When the young Fife kid got murdered.[13]

R.28, PageID# 2937. When Detective Hill emerged from the interrogation room a few minutes later, he told the other officers that Hill was going to cooperate and tell them what happened. At the time Detective Hill made this announcement, Hill was either crying or had tears in his eyes. *Id.* at 2759, 2811, 2839, 2873, 2937-38.

At Stewart's suggestion, Hill gave the police permission to tape his statement. *Id.* at 2759-60, 2873-76, 2912. Sergeant Steinbeck, Sergeant Stewart, and Detective Hill were all present when Hill gave this initial audiotaped statement, as well as when Hill gave a second statement that was videotaped by Detective James Teeple. *Id.* at 2874-

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[13] Detective Hill also denied kicking his nephew.

75. According to Stewart, Hill was not crying during the taped statement itself. About halfway through the audio-taping, the police asked Hill to sign the statement he had given to Steinbeck on September 13. *Id.* at 2903. Hill was also read his *Miranda* rights once more at some point prior to giving the second, videotaped statement. *Id.* at 2876, 2923, 2963-64. While giving his statements, Hill never asked to stop the interrogation, requested an attorney, or asked to leave. Sometime after the interrogation, Hill was placed under arrest based on the details included in his statements. *Id.* at 2776.

When asked questions about the nature of the interrogation generally, both Detective Hill and Sergeant Stewart denied that the police threatened or made promises to Hill during the interrogation, and asserted that Hill never asked for a lawyer. *Id.* at 2760, 2772, 2935, 2938. When prompted by the prosecutor about Hill's previous encounters with the police, Detective Hill estimated that by the date of the September 16, 1985 interrogation, Hill had been arrested by the Warren Police Department "[a]pproximately 15 to 20 times." *Id.* at 2929. Both Detective Hill and Sergeant Steinbeck testified that they had arrested Hill on prior occasions and had read him his *Miranda* rights "[m]any times." *Id.* at 2876, 2928-29. And two of the prosecution's exhibits at the suppression hearing included a waiver form and voluntary statement—both of which included a recitation of *Miranda* rights—signed by Hill on March 6, 1984, which was approximately a year-and-a-half before the September 16, 1985 interrogation.

In adjudicating this claim, the state appellate court rejected Hill's argument that his waiver of his

Miranda rights was invalid. *Hill*, 1989 WL 142761, at *5. Acknowledging that it needed to make "discrete inquiries" as to both the "knowing and intelligent" and "voluntary" aspects of Hill's waiver, the appellate court considered these criteria in turn.

With regard to the knowing and intelligent factor, the appellate court noted that although the "lack of mental acuity . . . can interfere with an accused's ability to give a knowing and intelligent waiver," there is no bright line rule for distinguishing between "those capable of an intelligent waiver from those who lack the ability to do so." *Id.* The appellate court also acknowledged the Supreme Court's admonition in *Connelly* that a suspect's mental condition, by itself, does not necessarily prevent him from effectively waiving his *Miranda* rights. *Id.* In analyzing the facts of Hill's case specifically, the appellate court opined:

> [Hill] admittedly suffers from some mental retardation (although the evidence presented is divergent as to the severity of the handicap) and has had concomitant difficulties in language comprehension throughout his formal education. [Hill] is categorized as being mildly to moderately retarded. Evidence was presented which indicates that appellant is illiterate and this court acknowledges that literal recognition of each word contained in the "*Miranda* Rights" and/or "waiver form" may be beyond [Hill's] mental comprehensive capacity.
>
> However, from the record here, particularly during the suppression hearing, this court is also aware (as was the trial court below) of the

> long and multi-faceted exposure [Hill] has had with the state's criminal justice system. The evidential table in this case also demonstrates that [Hill] exhibited a functional capacity to understand these rights, including the right to appointed counsel. This was evident from the exchange that occurred during the audio and video tape sessions. The officers who interrogated [Hill] had either significant contact with him and/or had questioned him on prior occasions and had developed informed estimates as to [Hill's] ability to understand, albeit in a vernacular sense, all aspects of the *Miranda* warning. The audio and video tapes of [Hill's] interrogations disclose that [Hill] was capable of understanding the questions put to him and of responding intelligently.
>
> Moreover, the behavior of [Hill] during the police investigation belies the notion that he was no more than a malleable victim of police suggestion. [Hill] possessed the requisite intelligence to implicate other persons in the murder and was capable of modifying his story when inconsistencies were demonstrated to him. Additionally, [Hill] qualified and corrected the police officers' misstatements of the factual scenario which he had related to them. He also was able to follow "verbal concepting," displaying an understanding of the officers' direction of questioning and the dialogue utilized during the interrogation.

Hill, 1989 WL 142761, at *6. Based on the aforementioned concerns, and citing the Supreme Court's decisions in *Miranda* and *Lego* in support,

the state appellate concluded that Hill's waiver was knowing and intelligent. *Id.*

In addressing voluntariness, the appellate court rejected Hill's argument that his waiver was involuntary "as a result of his mental [infirmities] and the coercive action of the police." *Id.* First, the court noted that Hill's IQ was not necessarily dispositive as to whether he was incapable of voluntarily waiving his *Miranda* rights, particularly since he had been read those rights in his many prior encounters with police. *Id.* at **6-7. In addressing Hill's argument that his intellectual deficiencies made him vulnerable to the police officers' "psychological ploys," the appellate court noted that Hill was read his *Miranda* rights multiple times on September 13 and 16, 1985, and "appeared articulate and coherent as he answered questions." *Id.* at *8. Finally, in concluding that the record was "devoid of evidence indicating that the custodial interrogation of [Hill] violated his constitutional rights," the appellate court reasoned that because (among other things): (1) Hill originally approached the police on September 12 of his own accord; (2) Hill was read his *Miranda* rights numerous times without ever being placed under arrest; and (3) "[t]he recorded conversations [between Hill and the police] d[id] not suggest the use of any improprieties by the police," Hill's *Miranda* claim was without merit. *Id.* at **9-10.

The Ohio Supreme Court ruled similarly, stating: "Upon a careful review of the record, we can discern no coercive or overreaching tactics employed by the police during questioning." *Hill*, 595 N.E.2d at 890. In making this finding, the court explicitly

acknowledged that before Hill turned 18, Detective Hill "would at times physically discipline [his nephew] at the request of [Hill's] mother."[14] *Id.* In fact, the court appeared to credit Detective Hill's version of events—i.e., that "[Hill] stated to [Detective] Hill that he was 'in the field behind Valu King when the young Fife boy got murdered.'" *Id.* The court also found, based on the Supreme Court's ruling in *Connelly* and Hill's "his prior dealings with the criminal process as a juvenile," that Hill's "mental aptitude did not undercut the voluntariness of his statements or his waiver of *Miranda* rights." *Id.* Finally, the Ohio Supreme Court rejected Hill's contention that his waiver was rendered involuntary by virtue of the police's tactics during the interrogation. *Id.* at 891 ("Upon a careful review of the testimony and the audiotape and videotape statements, we do not find that the interrogation tactics used by the police officers, even in light of [Hill's] mental capacity, rendered the statements involuntary, or that the officers improperly induced [Hill] to make incriminating statements.").

Reviewing the state courts' decisions under § 2254(d)(1), the district court found that Hill's arguments that he should be granted habeas relief on this claim were without merit. *Hill v. Anderson*, No. 4:96-cv-00795, 1999 U.S. Dist. LEXIS 23332, at **78-92 (N. D. Ohio Sept. 29, 1999).

Applying AEDPA's deferential review standard, we ask whether the state courts unreasonably

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[14] Hill was 18 at the time of the September 16, 1985 interrogation, and Detective Hill testified at the suppression hearing that he had not physically disciplined his nephew since at least six to eight months prior. R. 28, PageID# 2976.

applied Supreme Court precedent in finding that Hill's waiver of his *Miranda* rights was voluntary, knowing, and intelligent. *See* 28 U.S.C. § 2254(d)(1). *Connelly* tells us that a compromised mental state does not, "by itself and apart from its relation to official coercion," vitiate a defendant's ability to waive his *Miranda* protections. *See* 479 U.S. at 164. And *Miller v. Fenton*, 474 U.S. 104 (1985), directs us to treat state-court findings on "subsidiary questions, such as the length and circumstances of the interrogation, the defendant's prior experience with the legal process, and familiarity with the *Miranda* warnings" as "conclusive" on habeas review if they are "fairly supported in the record." *Id.* at 117.

In light of these admonitions, the state courts' conclusion that Hill effectively waived his *Miranda* rights was not "unreasonable" as that term has been defined by the Supreme Court. The state courts could plausibly credit Detective Hill's account of his interrogation techniques over Hill's allegations of physical abuse to find a lack of undue coercion and could point to Hill's prior experiences with the criminal justice system and the *Miranda* process as evidence that Hill understood the nature of his waiver.

Although the required deference to the state courts' finding compels our holding on this issue, we wish to express our consternation with this result. The record contains ample evidence demonstrating that Hill's waiver was neither voluntary nor knowing. Hill was interrogated, in private, by a police-officer uncle who admitted to disciplining Hill physically in the past, and who allegedly "'threw [Hill] against the wall,' slapped him across the face,

and told him that he 'better tell' the police what happened" during the course of the interrogation. *Supra* p. 28. Hill's uncle then purportedly kicked Hill under the table to induce his consent to a videotaped confession and kicked Hill again when he was reluctant to begin the confession. When considered alongside Hill's intellectual disabilities, Detective Hill's behavior raises grave questions about the voluntariness of Hill's waiver.

And while Hill was certainly exposed several times to *Miranda* warnings, we are not convinced that he ever registered the warnings' meaning. During the suppression hearing the state trial court held in 1985, Hill's attorney asked Hill a number of basic questions about his understanding of *Miranda*:

Q: [W]hat are your Constitutional Rights?

A: I don't know.

Q: What's the word constitution mean?

A: I don't know.

Q: What's the word appointed—

A: When you point at somebody.

Q: You point at somebody?

A: Yeah.

. . . .

Q: When the police talked to you, did you go ahead and talk to them?

A: Yes.

Q: Why?

A: They police. [sic] You're supposed to talk to them.

Q: You have to talk to them?

A: Yep!

Q: Do you know what's an attorney? [sic]

A: I don't know.

R.29, PageID# 3114-16.

It is difficult, in light of this testimony, to accept the state courts' determination that Hill "exhibited a functional capacity to understand [his] rights." *Hill*, 1989 WL 142761, at *6. Nevertheless, because of the procedural posture of this case, we are compelled to affirm the district court.

Accordingly, we **AFFIRM** the district court's denial of habeas relief as to his suppression claim.

VI. Inflammatory Statements by the Prosecutor During Hill's Bench Trial

Hill also makes a prosecutorial misconduct claim based on the prosecutor's allegedly inflammatory statements to the three-judge panel that convicted Hill and sentenced him to death.

This claim is governed by § 2254(d)(1). As indicated above, Hill must show that the state court's decision "involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

The full-text of the "inflammatory statements" challenged by Hill may be found in his opening brief. Some of those comments included:

- A reference to Raymond Fife being a 12-year-old boy from the community who had a "right to live," a right to "be in school," and a right "to be here today";
- Statements that Hill was an "animal," who "destroyed and devoured" Fife, and "would make the Marquis de Sade proud";
- A statement that "you don't necessarily have fingerprints on everything" with reference to the apparent lack of Fife's fingerprints on his bike;
- The prosecutor's opinion about which expert witness on a particular issue was "more qualified";
- A statement that Detective Hill did not want to testify against his nephew;
- A reference to Hill being a "poor, dumb boy" who nonetheless violently raped two women and therefore "relishe[d] . . . inflicting pain and torture [on] other human beings";
- A statement that Hill put Fife through a "living hell," that Fife "had no justice while he was living," and that justice demanded a guilty verdict;
- The prosecutor's opinion that defense counsel had not shown "any mitigating factors" and that the aggravated factors "clearly outweigh[ed] the absence of any mitigation";
- Two more references to Hill's history of sexual assault, which the prosecution argued belied the idea that Hill had "difficulty with his motors skills";

- A rambling soliloquy about how the prosecution would have liked to called Fife as a witness so he could describe the beating, strangulation, and sexual assault he endured, but Fife was "not here to testify about that thanks to [Hill]." The prosecutor also stated that Fife, if alive, would have testified about how he missed his family and his friends;
- A reference to Hill as "this manifestation of evil, this anomaly to mankind, this disgrace to mankind."

In adjudicating this claim as part of Hill's direct appeal, the Ohio Supreme Court (1) noted that trial counsel never objected to any of the "complained-of comments," (2) opined that those comments were therefore subject to plain error review only, and (3) concluded that the prosecutor's statements amount to "neither prejudicial error nor plain error[.]" *Hill*, 595 N.E.2d at 898. The Ohio Supreme Court also noted that in Ohio, "[courts] indulge in the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *Hill*, 595 N.E.2d at 898 (quoting *State v. White*, 239 N.E.2d 65, 70 (1968)).

The district court rejected Hill's prosecutorial misconduct claim as well, reasoning that:

> [Hill's] case was tried before a three judge panel [that] presumably was able to remember the evidence presented at trial and not be misled by any of the prosecutor's statements. Most of the statements were harmless . . . .

> Three judges should have been able to disregard any intended undue influence.[15]

1999 U.S. Dist. LEXIS 23332, at *110. Accordingly, the district court concluded that the Ohio Supreme Court's determination that "no prejudicial or plain error occurred . . . was not an unreasonable application of clearly established law." *Id.* at **110-11.

In assessing whether the Ohio Supreme Court's decision involved an unreasonable application of federal law, the relevant Supreme Court holding is the Court's decision in *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), which held that "a prosecutor's improper comments will be held to violate the Constitution only if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parker v. Matthews*, 576 U.S. 37, 45 (2012) (quoting *Darden*, 477 U.S. at 181). The Supreme Court has also held that "the *Darden* standard is a very general one, leaving courts 'more leeway in reaching outcomes in case-by-case determinations.'" *Id.* at 48 (citation, quotation marks, and ellipses omitted).

In *Darden*, the Supreme Court found that comments similar to some of those made by the prosecutor in this case—particularly allusions to the death penalty and the defendant being an "animal"—were improper. 477 U.S. at 179-80. Those comments,

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[15] The state appellate court, in adjudicating this claim, similarly noted that although some of the prosecutor's comments would have "perhaps [been] prejudicially erroneous in a jury trial, [that] was not so [in Hill's case]." *Hill*, 1989 WL 142761, at *15.

unlike the comments in this case, were made before a jury, not a three-judge panel. *Id.* at 170-71. Nonetheless, the Supreme Court noted that these improper statements did not "manipulate or misstate the evidence, [or] implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Id.* at 182.

In this case, it is clear that the prosecutor's comments were emotionally charged and designed to paint Hill in a bad light. However, it does not appear that they misstated the evidence in the case or implicated Hill's constitutional rights. Further, any efforts to play on the emotions of the three-judge panel would likely have been futile. Although they may not adopt a presumption as strong as the one "indulged" by the Ohio courts, federal courts similarly presume that a judge, as the trier of fact, can readily identify credible evidence, *United States v. Thomas*, 669 F.3d 421, 425 (4th Cir. 2012), give proper weight to the evidence, *Caban v. United States*, 728 F.2d 68, 75 (2d Cir. 1984), and understand what law is relevant to his or her deliberations, *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986). And Hill has put forth no evidence indicating that the three-judge panel that tried his case was incapable of discerning what constitutes admissible evidence and parsing such evidence out from any inflammatory or irrelevant[16] comments by the prosecutor.[17] For these reasons, we

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[16] For example, the three-judge panel disclaimed any reliance on Hill's "prior crimes . . . in reaching its verdict." *See Hill*, 595 N.E.2d at 893.

[17] Hill's reference to a single line in the panel's opinion that referred to Hill and Combs' "blood lust characterized by a series

conclude that the decision by the Ohio Supreme Court was not an unreasonable application of clearly established law.

We **AFFIRM** the district court's denial of habeas relief as to Hill's prosecutorial misconduct claim.

VII. The Trial Court's Failure to Hold a Pretrial Competency Hearing

Lastly, Hill argues that the trial court's failure to inquire about Hill's competency denied him a fair trial under the due process clause of the Fourteenth Amendment. Here, the term "trial court" refers to the court that tried Hill's underlying offenses in 1985 and 1986.

This claim is governed by § 2254(d)(1). As indicated above, the Supreme Court has held that to obtain relief under § 2254(d)(1), the petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). In assessing competence, the relevant question is whether the defendant's "mental condition is such that he lacks

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of acts of torture, rape, and murder," does not change this conclusion. The rest of the opinion describes Fife's injuries, and the means by which they were inflicted (based on the evidence at trial), in great detail. The opinion also indicates that the judges were struck by the "total lack of remorse" shown by Hill appearing at the police station to seek a reward after Fife's death. Looking at the document as a whole, there is no indication that the comment with which Hill takes issue was derived from the prosecutor's statements rather than the judges' own assessments of the offenses.

the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Indiana v. Edwards*, 554 U.S. 164, 170 (2008). If the defendant's mental condition meets this description, the courts may not try him.[18] *Id.*

Hill maintains that because the trial court knew that he had "limitations in vocabulary, ability to calculate, and ability to draw" and "could not recognize or understand a majority of the words on the *Miranda* waiver form," the trial court should have "conduct[ed] further inquiry into [Hill's] competency to stand trial." Hill's Br. at 124-25. With regard to this final issue, Hill requests that this Court determine "not whether the state court was unreasonable in finding Danny competent to stand trial, but whether it was unreasonable under *Pate*[19] and *Drope*[20] not to make such an inquiry in the first instance." *Id.* at 124. Hill also argues, with no elaboration and minimal citation to the record,[21] that

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[18] Again, our conclusion that Hill is intellectually disabled and thus ineligible for execution under *Atkins* does not mean that Hill was incompetent to stand trial or that the trial court should have presumed his incompetence and ordered a competency hearing *sua sponte*. The two inquiries are different, and even *Atkins* recognizes that "[m]entally retarded persons frequently . . . are competent to stand trial." 536 U.S. at 318.

[19] *Pate v. Robinson*, 383 U.S. 375 (1966).

[20] *Drope v. Missouri*, 420 U.S. 162 (1975).

[21] This issue occupies three pages in Hill's opening brief and just over a page in his reply brief. The only record citation in the opening brief seeks to demonstrate that Hill "could not recognize or understand a majority of the words on the *Miranda* waiver form."

the Ohio Supreme court "unreasonably applied *Pate* and *Drope*" in determining that Hill was competent to stand trial. *Id.* at 125.

The Warden, for his part, asserts that "[a]lthough Hill is intellectually limited, his demeanor at trial was such that the trial court had no reason to *sua sponte* assess Hill for competence to stand [trial]." The Warden also argues that:

> The trial record gives every indication that Hill was compliant, cooperative and appropriately attentive to the proceedings. Moreover, the trial judge had ample opportunity to assess Hill's ability to navigate through the trial proceedings, where Hill testified extensively during a pre-trial suppression hearing, and also had a direct colloquy with the trial court for acceptance of the jury waiver. In addition, none of the three mental health experts who testified for the defense at trial expressed a concern about Hill's competence to stand trial.

Warden's Br. at 97. Hill's reply brief does not address these contentions.

Neither the state appellate court nor the Ohio Supreme Court opinions from Hill's direct appeal noted Hill's competency argument as one of his nineteen assignments of error and twenty-five propositions of law, respectively. *See generally State v. Hill*, 595 N.E.2d 884 (Ohio 1992); *State v. Hill*, Nos. 3720, 3745, 1989 WL 142761 (Ohio Ct. App. Nov. 27, 1989). Instead, the only similar claims addressed by these courts pertained to Hill's arguments that he could not knowingly and voluntarily waive his right to counsel or his right to a

jury trial due to his alleged intellectual disability. *See, e.g.*, *Hill*, 595 N.E.2d at 890-91, 895; *Hill*, 1989 WL 142761, at **3, 5-7, 13-14. The district court found that Hill raised the issue of competency only under state law, not federal law, and that Hill did not raise the competency claim under federal law until filing for state post-conviction relief. *Hill*, 1999 U.S. Dist. LEXIS 23332, at **92-93. On this basis, the district court concluded that Hill's competency claim was procedurally defaulted. *Id.* at **93-94 (citing *State v. Hill*, No. 94-T-5116, 1995 WL 418683 (Ohio Ct. App. June 16, 1995)). The Warden argues that even if Hill's claim was not procedurally defaulted, it fails on the merits. We agree.

On December 16, 1985, the trial court held a hearing on Hill's motion to suppress his statements to the police. Defense counsel called Hill as a witness to testify with respect to "the circumstances under which [he] gave statements to the police department." R. 29, PageID# 3101. In response to the trial court's questions, Hill indicated that he understood the purpose and nature of the hearing. *Id.* at 3103-04. He went on to testify about the means by which he arrived at the police station, as well as his inability to leave police custody prior to the arrival of his mother on Friday, September 13, 1985. On Monday, September 16, 1984, Hill returned to the police station at his mother's behest with his uncle, Detective Hill, and another police officer, Sergeant Steinbeck. As discussed earlier, Hill testified that while he and Detective Hill were alone, Detective Hill threw Hill against the wall, slapped him, and told him to tell the police what had happened. Hill also claimed that after being physically abused by his uncle, he told the police what they wanted to hear

because he was afraid of both Detective Hill and the other officers. *Id.* at 3114, 3118-19.

Defense counsel, for his part, attempted to demonstrate that Hill could neither read nor write and that Hill signed the *Miranda* waiver without understanding its contents or knowing what it meant; meanwhile, the prosecutor attempted to demonstrate that Hill had been to the Warren police department many times before based on theft-related crimes and was therefore familiar with the department's *Miranda* form. *Id.* at 3107-09, 3115, 3121-23, 3152-53, 3155. On cross-examination, Hill testified that he signed the *Miranda* waiver because the police told him to do so. *Id.* at 3135-37. Hill's testimony ended following questions from the trial court about Hill's alleged physical abuse at the hands of Detective Hill.

Hill appeared before the trial court once more on January 7, 1986, this time to waive his right to a jury trial. *See Hill*, 595 N.E.2d at 889. The trial court's colloquy with Hill, which was designed to determine whether Hill's waiver was knowing and voluntary, included an explanation of the jury selection system, the role of the jury, the jury waiver's effect on some of Hill's pending motions, defense counsel's possible motives for seeking to waive Hill's right to a jury trial, and the differences between a jury and three-judge panel in terms of number of persons, familiarity with the law and the facts of the case, and demographic composition. The trial court read the waiver aloud to Hill and suggested the Hill go over the waiver with his attorney. Waiver of Jury Trial

Hr'g Tr. at 10-11.[22] Hill indicated that he had discussed the issue of waiver with both his attorney and his mother, and there was a 25-minute recess in which the attorney and Hill's mother apparently discussed the waiver with him further. *Id.* at 5-6. After the recess, Hill affirmatively stated that he wanted to be tried by the three-judge panel. *Id.* at 12.

A review of Hill's testimony during the December 16, 1985, suppression hearing reveals that Hill claimed to understand the nature of the hearing and was able to answer questions posed by the prosecutor, defense counsel, and the trial court. Hill stated more than once when he did not understand or did not know the answer to a question, either on his own or with attorney prompting. He also appeared to understand the role of the trial judge. Hill's interactions with the trial court at the January 7, 1986 hearing on his waiver of jury trial also failed to raise any red flags regarding competence. Although the trial court did most of the talking, Hill did not express any confusion about the nature of the waiver, and was given an opportunity to go over the considerations discussed by the trial court with his attorney and mother before and during the hearing. After Hill conferred with his attorney, the following exchange took place:

> COURT: All right. Danny, you've been talking with your lawyer now, have you not, for the last 25 minutes or so?
>
> DEFENDANT HILL: Yeah.

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[22] The transcript of the jury waiver hearing can be found in the district court record at R. 30 in *Hill v. Anderson*, No. 4:96-cv-00795 (N.D. Ohio Jan. 28. 1997).

COURT: And did he go over this matter of a jury trial with you?

DEFENDANT HILL: Yeah.

COURT: And you want to tell me now what decision you've made after talking this over.

DEFENDANT HILL: I want to have—

COURT: What do you want to do? Who do you want to try it? Three judges—

DEFENDANT HILL: Three judges.

COURT: —or do you want the jury?

DEFENDANT HILL: You.

COURT: I hope you understand—you mean myself and two other judges?

DEFENDANT HILL: (Nods head affirmatively.)

Id. At no point during the hearing did Hill behave in a manner, or make a statement indicating, that he did not understand the nature of the waiver.

On this record, there is no indication that Hill did not understand the nature of the proceedings against him or that he could not consult with defense counsel to assist in his case. *See Edwards*, 554 U.S. at 170. Although Hill is correct that the record suggests that he was functionally illiterate at the time of the suppression hearing, Hill cites no authority for the proposition that trial courts should equate illiteracy to incompetence. He also cites no authority for the proposition that because there were other signs that he was intellectually limited, i.e., his limited vocabulary or "ability to draw similarities," the trial court should have doubted his competence to stand

trial and ordered a competency hearing *sua sponte*. As indicated above, the trial court had at least two opportunities to observe Hill and interact with him directly, and these incidents did not suggest that Hill was incompetent to stand trial under *Pate*, *Drope*, or the more recent Supreme Court case, *Edwards*.

For the aforementioned reasons, we **AFFIRM** the district court's denial of habeas relief as to Hill's due process claim.

VIII. Conclusion

For the reasons articulated above, we **REVERSE** the district court's denial of habeas relief with regard to Hill's *Atkins* claim and we **REMAND** with instructions to grant the petition and to issue the writ of habeas corpus with respect to Hill's death sentence. We pretermit Hill's ineffective assistance of counsel claim based on *Atkins*, and **AFFIRM** the district court's denial of habeas relief with regard to his other three claims.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 99-4317/14-3718

DANNY HILL,
Petitioner–Appellant,

v.

CARL ANDERSON, Warden,
Respondent–Appellee,

Filed: February 2, 2018
Deborah S. Hunt, Clerk

BEFORE: MERRITT, MOORE, and CLAY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Northern District of Ohio at Youngstown.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of habeas relief with regard to Danny Hill's *Atkins* claim is REVERSED, and the case is REMANDED with instructions to grant the petition and to issue the writ of habeas corpus with respect to his death sentence. We pretermit Hill's ineffective assistance of counsel claim based on *Atkins*, and AFFIRM the district court's denial of habeas relief with regard to his other three claims.

ENTERED BY ORDER OF THE COURT:

/s/Deborah S. Hunt, Clerk

APPENDIX C

No. 99-4317

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DANNY HILL,
Petitioner–Appellant,

v.

CARL ANDERSON, WARDEN,
Respondent–Appellee,

Argued: May 1, 2002

Decided and Filed: August 13, 2002

BEFORE: MERRITT, MOORE, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Mark A. Vander Laan, DINSMORE & SHOHL, Cincinnati, Ohio, for Appellant.

Henry G. Appel, ATTORNEY GENERAL'S OFFICE OF OHIO, CAPITAL CRIMES SECTION, Columbus, Ohio, for Appellee.

ON BRIEF: Mark A. Vander Laan, Christopher R. McDowell, Amanda L. Prebble, DINSMORE & SHOHL, Cincinnati, Ohio, for Appellant.

Henry G. Appel, ATTORNEY GENERAL'S OFFICE OF OHIO, CAPITAL CRIMES SECTION, Columbus, Ohio, for Appellee.

OPINION BY: Merritt

OPINION

[***2] [*680] MERRITT, Circuit Judge. In this Ohio death penalty case, petitioner Danny Hill appeals from the district court's denial of a writ of habeas corpus following his murder conviction. Throughout his appeals, Hill has argued, among other things, that he is mentally retarded and that retardation prevented him from receiving a fair trial. Before this Court, Hill also advanced the claim that executing the mentally retarded violates the Eighth Amendment's ban on cruel and unusual punishments, correctly anticipating that the Supreme Court would [**2] so hold in *Atkins v. Virginia*, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (June 20, 2002). He has not presented this *Atkins* claim to the Ohio courts. Hill's petition thus mixes an unexhausted claim with claims previously heard by state courts. Because Hill's new claim should first be heard by a state court, we return this case to the district court with instructions that it remand Hill's *Atkins* claim to a state court and stay his remaining claims pending resolution of the retardation issue.

I. Facts

We briefly present the necessary facts, drawn primarily from the Ohio Supreme Court's detailed decision upholding Hill's conviction and sentencing on direct appeal. *See State v. Hill*, 64 Ohio St. 3d 313, 595 N.E.2d 884 (Ohio 1992), *cert. denied*, 507 U.S. 1007, 123 L. Ed. 2d 272, 113 S. Ct. 1651 (1993).

On Tuesday, September 10, 1985, in Warren, Ohio, twelve-year-old Raymond Fife left home on his bicycle at approximately 5:15 p.m. to visit a friend's home. When he did not arrive by 6 p.m., a search began. Searchers found him that evening in a field

behind a local store. The boy had been beaten, sexually [**3] assaulted, strangled, and burned. He died two days later without regaining consciousness.

[***3] That Thursday, eighteen-year-old Danny Hill appeared at the Warren police station to inquire about a reward offered for information about the assault. He told police he had seen a youth riding Fife's bike, but was unable to explain to police how he knew the bike was Fife's; he also appeared to know more about the crime than had been released to the public. When quizzed about a suspect in the crime, Tim Combs, Hill admitted he knew him and suggested that Combs committed the crime. Hill returned to the station the next day, received a *Miranda* warning although he was not in custody, and gave an additional statement. Later that day police discovered eyewitnesses who had seen [*681] both Combs and Hill near the scene of the crime at about the time Fife was attacked.

The next Monday, an additional officer was assigned to the case: Detective Morris Hill, Danny's uncle. Detective Hill had previously dealt with his nephew when Danny had been suspected of a crime. Two years earlier, Danny Hill was arrested for burglarizing his grandmother's (Detective Hill's mother's) home. According to Detective [**4] Hill, Danny's mother then asked him to "whup [Danny's] ass," and when Danny, then in police custody, claimed he had nothing to do with the burglary, Detective Hill "smacked him in the mouth." Detective Hill said he had struck Danny while he was in police custody "a couple of times."

After he was assigned to the Fife case, Detective Hill and another officer went to Danny Hill's home

where he agreed to accompany them to the police station. At the station, Danny Hill was again Mirandized. Danny Hill was then left alone with his uncle for a few minutes. According to Detective Hill, he told Danny that he believed Danny had something to do with Fife's murder, and Danny began crying and admitted involvement in the crime. When the other officers returned, Danny Hill was again given his rights and then made two statements admitting that he witnessed the attack, though he insisted that Combs was the one who actually assaulted Fife. Hill did admit, though, that he stayed with Fife while Combs went to get lighter fluid, which Combs subsequently poured on Fife and set alight.

[***4] Danny Hill was subsequently charged with kidnaping, rape, aggravated arson, felonious sexual penetration, [**5] aggravated robbery, and aggravated murder with specifications. Waiving his right to a jury trial, Hill's case was heard by a three-judge panel. At trial, in addition to Hill's statements, significant eyewitness, circumstantial, and forensic evidence was offered linking him to the murder. The panel found Hill guilty of all charges except aggravated robbery. At a mitigation hearing, three defense expert witnesses testified that Hill had an IQ below 70, had been raised in a poor environment, and was a follower. After weighing aggravating and mitigating factors, the judges sentenced Hill to death despite his mental retardation.

II. Analysis

In a habeas appeal, we review the district court's legal conclusions *de novo* and its factual findings for clear error. *See Taylor v. Withrow*, 288 F.3d 846, 850 (6th Cir. 2002).

A. Mental retardation and Atkins

In *Atkins*, the Supreme Court held at the end of its term that executing a mentally retarded individual violates the Eighth Amendment's ban on cruel and unusual punishments. *See* 122 S. Ct. at 2250. This holding applies retroactively; in *Penry v. Lynaugh*, when the question was last [**6] before it, the Court recognized that a constitutional rule barring execution of the retarded would fall outside *Teague v. Lane*'s ban on retroactive application of new constitutional rules because it placed the ability to execute the retarded "beyond the State's power." 492 U.S. 302, 330, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989) (discussing *Teague*, 489 U.S. 288, 301-02, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989)). Although *Atkins* barred the execution of the mentally retarded, it did not set down a procedure for determining whether an individual is sufficiently retarded to escape execution, leaving it to the states to develop "appropriate ways to enforce the constitutional restrictions" on executing the mentally retarded, just as they developed new safeguards to prevent [*682] the execution of the insane following the Court's ruling in *Ford v. Wainwright*. *Atkins*, 122 S. Ct. at 2252 (citing *Ford*, 477 U.S. 399, 91 L. Ed. 2d 335, 106 S. Ct. 2595 [***5] (1986)). In *Atkins*, Virginia contended that the petitioner was not retarded, so the Court remanded his case to state court.

The Supreme Court's decision to return Atkins's case to state courts suggests that we should return Hill's [**7] Eighth Amendment retardation claim to the state for further proceedings. Here, as in *Atkins*, the state of Ohio has not formally conceded that the petitioner is retarded. Though Ohio courts reviewing

his case have concluded that Danny Hill is retarded, *see, e.g., Hill*, 595 N.E.2d at 901, and voluminous expert testimony supported this conclusion, J.A. at 3264-67, 3332-35, 3379-80, Hill's retardation claim has not been exhausted or conceded. Ohio should have the opportunity to develop its own procedures for determining whether a particular claimant is retarded and ineligible for death. We note that, when discussing retardation in *Atkins*, the Supreme Court cited with approval psychologists' and psychiatrists' "clinical definitions of mental retardation," and presumably expected that states will adhere to these clinically accepted definitions when evaluating an individual's claim to be retarded. *See* 122 S. Ct. at 2245 n.3, 2250-2251.

B. The mixed petition problem

Because Hill's Eighth Amendment mental retardation issue is raised for the first time in this federal habeas proceeding, and has not been raised in state court, it creates a so-called [**8] "mixed" petition. Under the Antiterrorism Act, we may not grant a petition containing unexhausted claims except in a narrow range of special circumstances, not present here, or unless the State explicitly waives the exhaustion requirement, which it has not done. *See* 28 U.S.C. § 2254(b).

We may deny a mixed petition on its merits, *see id.* § 2254(b)(2), but we will not do so here because the issue regarding the voluntariness of Hill's confession raises a serious question. "[A] confession cannot be used if it is involuntary." *United States v. Macklin*, 900 F.2d 948, 951 (6th Cir. 1990), *cert. denied*, 498 U.S. 840 (1990) (citing *United States v. Washington*, 431 U.S. 181, 186-87, 52 L. Ed. 2d 238,

97 S. Ct. 1814 (1977)). [***6] A confession is involuntary only if there is (1) police coercion or overreaching which (2) overbore the accused's will and (3) caused the confession. *See Colorado v. Connelly*, 479 U.S. 157, 165-66, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986); *United States v. Brown*, 66 F.3d 124, 126-27 (6th Cir. 1995). When a suspect suffers from some mental incapacity, [**9] such as intoxication or retardation, and the incapacity is known to interrogating officers, a "lesser quantum of coercion" is necessary to call a confession into question. *United States v. Sablotny*, 21 F.3d 747, 751 (7th Cir. 1994); *see also Nickel v. Hannigan*, 97 F.3d 403, 410 (10th Cir. 1996).

According to the record, Hill first came to the attention of police when he inquired about a reward offered for information on Raymond Fife's death. Questioned twice, he consistently denied any involvement in the killing. Then his uncle was assigned to the case. After being brought to the station again and left alone with his uncle for a few minutes, Danny Hill made an abrupt about-face and confessed to involvement in the crime. In evaluating these events, Danny Hill's previous interactions with his uncle are important: twice before, when Hill was in police custody, his uncle struck him when he refused to talk. Even accepting his uncle's version of events, in [*683] which Detective Hill simply told Danny Hill he believed he was involved in the killing, this episode raises a serious question of coercion. That any officer had struck a suspect is troubling; of special [**10] concern here is that Danny Hill was struck by an officer who was also a close family member.

A suspect's "mental condition is surely relevant to an individual's susceptibility to police coercion." *Colorado v. Connelly*, 479 U.S. 157, 165, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986). State courts, including the Ohio Supreme Court, have clearly stated that Hill is retarded. *See Hill*, 595 N.E.2d at 901. The retarded have, "by definition . . . diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 122 S. Ct. at 2250. *See also* Morgan Cloud et al., [***7] *Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. Chi. L. Rev. 495, 511-12 (2002) (noting that the retarded are "unusually susceptible to the perceived wishes of authority figures. . . ," have "a generalized desire to please . . . ," "are often unable to discern when they are in an adversarial situation . . . ," and "have difficulty distinguishing between [**11] the fact and the appearance of friendliness"); Welsh S. White, *What is an Involuntary Confession Now?*, 50 Rutgers L. Rev. 2001, 2044 (1998) (stating there is "ample support for [the] conclusion that mentally handicapped suspects are 'especially vulnerable to the pressures of accusatorial interrogation'.").

In *Zarvela v. Artuz*, the Second Circuit faced a similar mixed petition problem. *See* 254 F.3d 374, 380 (2001), *cert. denied*, 122 S. Ct. 506 (2001). Crafting a solution consistent with the purposes of the Antiterrorism Act, the court remanded to the district court with instructions to dismiss the unexhausted claim and stay the exhausted claims, but conditioned the stay on the petitioner promptly

seeking state remedies and, when the state remedies were exhausted, promptly returning to federal court. *See id.* at 381. *Zarvela* has been cited with approval by this Court. *See Palmer v. Carlton*, 276 F.3d 777, 778 (6th Cir. 2002).

Here we adopt *Zarvela*'s approach and remand Hill's case to district court with instructions to dismiss his *Atkins* claim to be considered by state court and to [**12] stay his remaining claims pending exhaustion of state court remedies. To ensure that Hill does not draw out his state court proceedings, we instruct the district court to condition the stay on Hill's seeking relief from a state court on his *Atkins* claim within 90 days of the date the mandate issues from this Court.

Accordingly, it is so ordered.

APPENDIX D

Case No. 4:96cv00795

UNITED STATES DISTRICT COURT FOR THE
NOTHERN DISTRICT OF OHIO,
EASTERN DIVISION

DANNY LEE HILL,
Petitioner,

v.

CARL ANDERSON, WARDEN,
Respondent,

Decided and Filed: June 25, 2014

JUDGES: John R. Adams, Judge.

COUNSEL: [*1] For Danny Hill, Petitioner: Cynthia Ann Yost, LEAD ATTORNEY, Disability Rights Ohio, Columbus, OH; George C. Pappas, LEAD ATTORNEY, Akron, OH; Patricia A. Millhoff, LEAD ATTORNEY, Akron, OH; Vicki R.A. Werneke, LEAD ATTORNEY, Alan C. Rossman, Carolyn M. Kucharski, Office of the Federal Public Defender - Cleveland, Northern District of Ohio, Cleveland, OH.

For Carl Anderson, Respondent: Charles L. Wille, LEAD ATTORNEY, Stephen E. Maher, Thomas E. Madden, Office of the Attorney General - Capital, Crimes Section, Columbus, OH; Matthew J. Lampke, LEAD ATTORNEY, Office of the Attorney General, State of Ohio, Columbus, OH.

OPINION BY: John R. Adams

OPINION

MEMORANDUM OF OPINION

This matter is before the Court upon Petitioner Danny Lee Hill's ("Hill" or "Petitioner") Amended Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254. Through this petition, Hill challenges the constitutionality of his death sentence, rendered by an Ohio court, under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), which held that the Eighth Amendment forbids the execution of intellectually disabled offenders.[1] (ECF No. 94.) The Respondent, Warden Carl Anderson ("Respondent"), filed [*2] a Supplemental Return of Writ Regarding Atkins Claim. (ECF No. 98.) Hill filed a Traverse and Supplement to Traverse. (ECF Nos. 102 and 103, respectively.) For the following reasons, the Amended Petition for Writ of Habeas Corpus is denied.

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[1] This Court will use the term "intellectual disability" in place of the term "mental retardation" in this opinion. The designation intellectually disabled, or "ID," is now widely used by the medical community, educators and others, since the label mentally retarded long has carried a painful stigma. The terms are synonymous. See American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support* 12 (11th ed. 2010) ("[T]he term ID covers the same population of individuals who were diagnosed previously with mental retardation."). *See also Hall v. Florida*, 134 S. Ct. 1986, 1999, 188 L. Ed. 2d 1007 (U.S. 2014).

I. Factual History

On February 28, 1986, a three-judge panel sentenced Hill to death for the aggravated murder of twelve-year-old Raymond Fife ("Fife"). The Supreme Court of Ohio set out the following account of Hill's crime, as adduced by the evidence presented at trial, and judicial proceedings [*3] upon considering Hill's direct appeal of his conviction and sentence:

> On September 10, 1985, at approximately 5:15 p.m., twelve-year-old Raymond Fife left home on his bicycle to visit a friend, Billy Simmons. According to Billy, Raymond would usually get to Billy's residence by cutting through the wooded field with bicycle paths located behind the Valu-King store on Palmyra Road in Warren.
>
> Matthew Hunter, a Warren Western Reserve High School student, testified that he went to the Valu-King on the date in question with his brother and sister shortly after 5:00 p.m. Upon reaching the front of the Valu-King, Hunter saw Tim Combs and defendant-appellant, Danny Lee Hill, walking in the parking lot towards the store. After purchasing some items in the Valu-King, Hunter observed defendant and Combs standing in front of a nearby laundromat. Combs greeted Hunter as he walked by. Hunter also saw Raymond Fife at that time riding his bike into the Valu-King parking lot.
>
> Darren Ball, another student at the high school, testified that he and Troy Cree left football practice at approximately 5:15 p.m. on September 10, and walked down Willow Street

to a trail in the field located behind the Valu-King. [*4] Ball testified that he and Cree saw Combs on the trail walking in the opposite direction from the Valu-King. Upon reaching the edge of the trail close to the Valu-King, Ball heard a child's scream, "like somebody needed help or something."

Yet another student from the high school, Donald E. Allgood, testified that he and a friend were walking in the vicinity of the wooded field behind the Valu-King between 5:30 p.m. and 6:00 p.m. on the date in question. Allgood noticed defendant, Combs and two other persons "walking out of the field coming from Valu-King," and saw defendant throw a stick back into the woods. Allgood also observed Combs pull up the zipper of his blue jeans. Combs "put his head down" when he saw Allgood.

At approximately 5:50 p.m. on the date in question, Simmons called the Fife residence to find out where Raymond was. Simmons then rode his bicycle to the Fifes' house around 6:10 p.m. When it was apparent that Raymond Fife's whereabouts were unknown, Simmons continued on to a Boy Scouts meeting, while members of the Fife family began searching for Raymond.

At approximately 9:30 p.m., Mr. Fife found his son in the wooded field behind the Valu-King. Raymond was naked and [*5] appeared to have been severely beaten and burnt in the face. One of the medics on the scene testified that Raymond's groin was swollen and

bruised, and that it appeared that his rectum had been torn. Raymond's underwear was found tied around his neck and appeared to have been lit on fire.

Raymond died in the hospital two days later. The coroner ruled Raymond's death a homicide. The cause of death was found to be cardiorespiratory arrest secondary to asphyxiation, subdural hematoma and multiple trauma. The coroner testified that the victim had been choked and had a hemorrhage in his brain, which normally occurs after trauma or injury to the brain. The coroner also testified that the victim sustained multiple burns, damage to his rectal-bladder area and bite marks on his penis. The doctor who performed the autopsy testified that the victim sustained numerous external injuries and abrasions, and had a ligature mark around his neck. The doctor also noticed profuse bleeding from the victim's rectal area, and testified that the victim had been impaled with an object that had been inserted through the anus, and penetrated through the rectum into the urinary bladder.

On September 12, 1985, defendant [*6] went downtown to the Warren Police Station to inquire about a $5,000 reward that was being offered for information concerning the murder of Raymond Fife. Defendant met with Sergeant Thomas W. Stewart of the Warren Police Department and told him that he had "just seen Reecie Lowery riding the boy's bike who was beat up." When Stewart asked

defendant how he knew the bike he saw was the victim's bike, defendant replied, "I know it is." Defendant then told Stewart, "If you don't go out and get the bike now, maybe [Lowery will] put it back in the field." According to Stewart, the defendant then stated that he had seen Lowery and Andre McCain coming through the field at around 1:00 that morning. In the summary of his interview with defendant, Stewart noted that defendant "knew a lot about the bike and about the underwear around the [victim's] neck." Also, when Stewart asked defendant if he knew Tim Combs, defendant replied, "Yeah, I know Tim Combs. * * * I ain't seen him since he's been out of the joint. He like boys. He could have done it too."

On September 13, 1985, the day after Stewart's interview with defendant, Sergeant Dennis Steinbeck of the Warren Police Department read Stewart's [*7] summary of the interview, and then went to defendant's home and asked him to come to the police station to make a statement. Defendant voluntarily went to the police station with Steinbeck, whereupon defendant was advised of his *Miranda* rights and signed a waiver-of-rights form. Defendant made a statement that was transcribed by Steinbeck, but the sergeant forgot to have defendant sign the statement. Subsequently, Steinbeck discovered that some eyewitnesses had seen defendant at the Valu-King on the day of the murder.

On the following Monday, September 16, Steinbeck went to defendant's house accompanied by defendant's uncle, Detective Morris Hill of the Warren Police Department. Defendant again went voluntarily to the police station, as did his mother. Defendant was given his *Miranda* rights, which he waived at that time as well. After further questioning by Sergeants Stewart and Steinbeck and Detective Hill, defendant indicated that he wanted to be alone with his uncle, Detective Hill. Several minutes later, defendant stated to Hill that he was "in the field behind Valu-King when the young Fife boy got murdered."

Defendant was given and waived his *Miranda* rights again, and then made [*8] two more voluntary statements, one on audiotape and the other on videotape. In both statements, defendant admitted that he was present during the beating and sexual assault of Raymond Fife, but that Combs did everything to the victim. Defendant stated that he saw Combs knock the victim off his bike, hold the victim in some sort of headlock, and throw him onto the bike several times. Defendant further stated that he saw Combs rape the victim anally and kick him in the head. Defendant stated that Combs pulled on the victim's penis to the point where defendant assumed Combs had pulled it off. Defendant related that Combs then took something like a broken broomstick and jammed it into the victim's rectum. Defendant also stated that Combs choked the victim and burnt him with lighter fluid. While defendant never admitted any

direct involvement in the murder, he did admit that he stayed with the victim while Combs left the area of the attack to get the broomstick and the lighter fluid used to burn the victim.

Upon further investigation by authorities, defendant was indicted on counts of kidnapping, rape, aggravated arson, felonious sexual penetration, aggravated robbery and aggravated murder [*9] with specifications.

On December 16, 1985, a pretrial hearing was held on defendant's motion to suppress statements made to police officers both orally and on tape. On January 17, 1986, the court of common pleas concluded as follows:

"It is the opinion of this Court that no Fourth Amendment violation was shown because [defendant] was at no time 'seized' by the police department, but rather came in either voluntarily, or as in the case of September 16th because of his mother's demands.

"* * *

"Defendant's Fifth Amendment Rights were clearly protected by the numerous *Miranda* Warnings and waivers. Though this Court believes that the defendant could not have effectively read the rights or waiver forms, the Court relies on the fact that at any time he was given a piece of paper to sign acknowledging receipt of the *Miranda* Warnings and waiving his rights, the paper was always read to him before he affixed any of his signatures.

"Though defendant is retarded, he is not so seriously impaired as to have been incapable of voluntarily and knowingly given the statements which the defendant now seeks to suppress. The Court reaches this conclusion after seeing and listening to the defendant at the Suppression [*10] Hearing and listening to and watching the tape recording and videotaped statements of the defendant. The Court concludes that the statements were made voluntarily, willingly, and knowingly."

Meanwhile, on January 7, 1986, defendant appeared before the trial court and executed a waiver of his right to a jury trial.

On January 21, 1986, defendant's trial began in front of a three-judge panel. Among the voluminous testimony from witnesses and the numerous exhibits, the following evidence was adduced:

Defendant's brother, Raymond L. Vaughn, testified that he saw defendant wash his gray pants on the night of the murder as well as on the following two days. Vaughn identified the pants in court, and testified that it looked like defendant was washing out "something red. * * * It looked like blood to me * * * *."

Detective Sergeant William Carnahan of the Warren Police Department testified that on September 15, 1985 he went with eyewitness Donald Allgood to the place where Allgood stated he had seen defendant and Combs coming out of the wooded field, and where he had seen defendant toss "something" into the woods. Carnahan testified that he returned to

the area with workers from the Warren Parks [*11] Department, and that he and Detective James Teeple found a stick about six feet from the path where Allgood saw defendant and Combs walking.

Dr. Curtis Mertz, a forensic odontologist, stated that: "It's my professional opinion, with reasonable degree of medical certainty, that Hill's teeth, as depicted by the models and the photographs that I had, made the bite on Fife's penis."

The defense called its own forensic odontologist, Dr. Lowell Levine, who stated that he could not conclude with a reasonable degree of certainty as to who made the bite marks on the victim's penis. However, Levine concluded: "What I'm saying is either Hill or Combs, or both, could have left some of the marks but the one mark that's consistent with the particular area most likely was left by Hill."

Doctor Howard Adelman, the pathologist who performed the autopsy of the victim's body, testified that the size and shape of the point of the stick found by Detective Carnahan was "very compatible" with the size and shape of the opening through the victim's rectum. Adelman described the fit of the stick in the victim's rectum as "very similar to a key in a lock."

State v. Hill, 64 Ohio St. 3d 313, 313-17, 1992 Ohio 43, 595 N.E.2d 884, 886-89 (Ohio 1992).

II. [*12] Procedural History[2]

A. State-Court Proceedings

The Trumbull County Grand Jury indicted Hill for the aggravated murder of Raymond Fife on September 10, 1985.[3] (App. to Return of Writ, Ex. A.) Hill's intellectual disabilities quickly surfaced as a central issue in Hill's defense when his counsel, Attorney James Lewis of the Ohio Public Defender's Office, filed a motion to suppress Hill's statements to police. Hill argued that because he was intellectually disabled, the police were able to coerce him into signing a waiver of his right to counsel, which he could not read and did not understand, and confessing to his role in the crime. The court conducted a three-day hearing on the suppression motion beginning on December 16, 1985, at which numerous witnesses testified, including Hill and a

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[2]The procedural history of Hill's direct appeals, post-conviction proceedings, and initial habeas proceedings is more fully set forth in this Court's Memorandum of Opinion and Order dated September 29, 1999. (ECF No. 54.) The Court includes here only the procedural history relevant to the claims pending before the Court, as asserted in Hill's Amended Petition for Writ of Habeas Corpus. (ECF No. 94.)

[3]The first count of the Indictment charged Hill with aggravated murder in violation of Ohio Rev. Code § 2941.14. The murder count included four capital felony murder specifications under Ohio Rev. Code § 2929.04(A)(7), charging Hill with murder while committing kidnapping, rape, aggravated arson and aggravated robbery. Hill also was indicted separately for: kidnapping, in violation of Ohio Rev. Code § 2905.01; rape, in violation of Ohio Rev. Code § 2907.02; aggravated arson, in violation of Ohio Rev. Code § 2909.02; aggravated robbery, in violation of Ohio Rev. Code § 2911.01; and felonious sexual penetration in violation of Ohio Rev. Code § 2907.12(A)(1),(3). (App. to Return of Writ, Ex. A.)

clinical [*13] psychologist who opined that Hill was mildly intellectually disabled. (ECF Nos. 28, 29.) The trial court denied Hill's motion. On January 7, 1986, Hill again appeared before the trial court and executed a waiver of his right to a jury trial. (ECF No. 30.)

Hill's trial began on January 21, 1986, before a three-judge panel. At the close of trial, on January 31, 1986, the panel of judges deliberated for five hours and unanimously found Hill guilty on all counts, except the aggravated robbery count and [*14] the specification of aggravated robbery to the aggravated murder count. (ECF No. 27.) The court held a mitigation hearing beginning on February 26, 1986, at which three psychologists testified that Hill was intellectually disabled. The panel considered the following factors in possible mitigation:

> (1) The age of [Hill]; (2) The low intelligence of [Hill]; (3) The poor family environment; (4) The failure of the State or society to prevent this crime; (5) [Hill's] impaired judgment; (6) Whether or not he was a leader or follower.

The panel concluded that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. Two days later, on February 28, 1986, the panel sentenced Hill to ten to twenty-five years' imprisonment for both aggravated arson and kidnapping, life imprisonment for rape and felonious sexual penetration, and the death penalty for aggravated murder with specifications.[4] (ECF No. 24.)

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[4] Timothy Combs also was charged and convicted in a separate trial as a principal offender in Fife's murder. *See State*

Hill appealed his conviction and sentence to the Eleventh District Court of Appeals [*15] and the Ohio Supreme Court. He maintained throughout his direct appeals that he was intellectually disabled, and that because of this condition his constitutional rights were violated during the police interrogation and trial. He claimed, for example, that his Sixth Amendment right to counsel and Fourteenth Amendments rights were violated because, as an intellectually disabled person, he could not knowingly, voluntarily, and intelligently waive his right to counsel during custodial interrogation. *Hill*, 64 Ohio St. 3d at 318-19, 595 N.E.2d at 890-91. He further argued that his statements to the police were not voluntary, because they were induced by psychological tactics designed to take advantage of an intellectually disabled person who was essentially illiterate. *Id.* at 318-19, 595 N.E.2d at 890-91. He also claimed that, given his intellectual disability, the police did not properly advise him of his *Miranda* rights, nor did he knowingly, voluntarily and intelligently waive such rights. *Id.* at 319, 595 N.E.2d at 891. Finally, Hill asserted that the trial court failed to consider all of the evidence of his intellectual disability as mitigating evidence when determining his sentence. [*16] *Id.* at 333-35, 595 N.E.2d at 901-02.

In discussing Hill's claims, both the Eleventh District Court of Appeals and the Ohio Supreme Court acknowledged Hill's intellectual disability. The Ohio Supreme Court stated, "[W]e find that [Hill's] mental retardation is a possible mitigating factor."

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v. Combs, No. 1725, 1988 Ohio App. LEXIS 4760, 1988 WL 129449 (Ohio Ct. App. Dec. 2, 1988).

Id. at 335, 595 N.E.2d at 901. It summarized the testimony of the psychologists who testified during the mitigating phase of Hill's trial, stating:

> Dr. Douglas Darnall, a psychologist, testified that defendant had an I.Q. of 55 and that his intelligence level according to testing fluctuates between mild retarded and borderline intellectual functioning, and that he is of limited intellectual ability. Dr. Darnall did state, however, that defendant was able to intellectually understand right from wrong.
>
> Dr. Nancy Schmidtgoessling, a clinical psychologist, testified that defendant had a full scale I.Q. of 68, which is in the mild range of mental retardation, and that the defendant's mother was also mildly retarded. Dr. Schmidtgoessling also testified that defendant's moral development level was "primitive," a level at which "one do[es] things based on whether you think you'll get caught or whether it feels [*17] good. [T]hat's essentially whereabout [*sic*] a 2-year old is."
>
> Dr. Douglas Crush, another psychologist, testified that defendant had a full-scale I.Q. of 64, and that his upper level cortical functioning indicated very poor efficiency.
>
> Other mitigation testimony on behalf of defendant indicated that he was a follower and not a leader, who had to be placed in group homes during his youth.

Id. at 334-35, 595 N.E.2d at 901. Similarly, the court of appeals concluded that Hill

> admittedly suffers from some mental retardation (although the evidence presented is divergent as to the severity of the handicap) and has had concommitant difficulties in language comprehension throughout his formal education. [Hill] is categorized as being mildly to moderately retarded. Evidence was presented which indicates that [Hill] is illiterate . . . .

State v. Hill, Nos. 3720, 3745, 1989 Ohio App. LEXIS 4462, 1989 WL 142761, at *6 (Ohio Ct. App. Nov. 27, 1989). It also found,

> The record is replete with competent, credible evidence which states that [Hill] has a diminished mental capacity. He is essentially illiterate, displays poor word and concept recognition and, allegedly, has deficient motor skills. [Hill] is characterized as being mildly [*18] to moderately retarded. There is some suggestion that [Hill's] "mental age" is that of a seven to nine year old boy. Testimony places [Hill's] I.Q. between 55 and 71, which would cause him to be categorized as mildly to moderately retarded.

1989 Ohio App. LEXIS 4462, [WL] at *32.

The Ohio courts, however, denied Hill's claims based on his intellectual disability and did not find his disability to be a significant mitigating factor. The Ohio Supreme Court noted that "there are various levels of mental retardation, and a person must be viewed individually as to the degree of retardation." *Hill*, 64 Ohio St. 3d at 335, 595 N.E.2d at 901. It ultimately found "a very tenuous relationship between the acts he committed and his

level of mental retardation. As several of the experts pointed out, [Hill] did not suffer from any psychosis, and he knew right from wrong." *Id.* The court also found that based on legal precedent and Hill's "prior dealings with the criminal process as a juvenile, [Hill's] mental aptitude did not undercut the voluntariness of his statements or his waiver of *Miranda* rights." *Id.* at 318, 595 N.E.2d at 890.

The court of appeals, in rejecting Hill's *Miranda* claim, concluded,

> However, from the record here, [*19] particularly during the suppression hearing, this court is also aware (as was the trial court below) of the long and multifaceted exposure [Hill] has had with the state's criminal justice system. The evidential table in this case also demonstrates that [Hill] exhibited a functional capacity to understand [his *Miranda*] rights, including the right to appointed counsel. . . .
>
> Moreover, the behavior of [Hill] during the police investigation belies the notion that he was no more than a malleable victim of police suggestion. [Hill] possessed the requisite intelligence to implicate other persons in the murder and was capable of modifying his story when inconsistencies were demonstrated to him. Additionally, [Hill] qualified and corrected the police officers's [*sic*] misstatements of the factual scenario which he had related to them. He was also able to follow "verbal concepting," displaying an understanding of the officers [*sic*] direction of questioning and the dialogue utilized during the interrogation.

Hill, 1989 Ohio App. LEXIS 4462, 1989 WL 142761, at *6. It also discounted Hill's low intelligence and impaired judgment as mitigating factors, stating,

> Consideration of evidence delineating [Hill's] mental retardation [*20] is more properly applied when evaluating his ability to knowingly, intelligently and voluntarily waive his constitutional rights. There is no evidence presented that requires the conclusion that this crime was committed because a mental defect precluded [Hill] from making the correct moral or legal choice.

1989 Ohio App. LEXIS 4462, [WL] at *32.

The Ohio courts affirmed Hill's conviction and sentence on direct appeal. *State v. Hill*, Nos. 3720, 3745, 1989 Ohio App. LEXIS 4462, 1989 WL 142761 (Ohio Ct. App. Nov. 27, 1989); *State v. Hill*, 64 Ohio St. 3d 313, 1992 Ohio 43, 595 N.E.2d 884 (Ohio 1992), *reh'g denied*, 65 Ohio St. 3d 1421, 598 N.E.2d 1172 (Ohio 1992). Hill then sought review from the United States Supreme Court. One of the questions he presented to the Court was,

> Whether a conviction and sentence of death may stand when statements are elicited from a mentally retarded, essentially illiterate accused through misconduct of law enforcement officials, coercion by psychological tactics, and promises of leniency in violation of the Fourth, Sixth and Fourteenth Amendments.

(App. to Return of Writ, Ex. T, 2.) The Supreme Court denied certiorari on March 29, 1993. *Hill v.*

Ohio, 507 U.S. 1007, 113 S. Ct. 1651, 123 L. Ed. 2d 272 (1993).

Hill continued to assert claims related to his intellectual [*21] disability in state post-conviction proceedings, including claims related to the trial court's weighing of mitigating factors, his waiver of his right to counsel and to a jury, and ineffectiveness of trial counsel for not properly investigating and presenting evidence of his intellectual disability. He attached to his petition affidavits of two experts in the field of intellectual disability, each of whom averred that Hill was intellectually disabled. (App. to Return of Writ, Ex. Y.) The trial court denied Hill's post-conviction petition on July 18, 1994, specifically finding the two expert opinions "unpersuasive and insufficient to establish substantive grounds for relief." (*Id.*, Exs. FF; GG, 11.) The Eleventh District Court of Appeals affirmed the trial court's decision on July 16, 1995. *State v. Hill*, No. 94-T-5116, 1995 Ohio App. LEXIS 2684, 1995 WL 418683 (Ohio Ct. App. June 16, 1995). The Ohio Supreme Court declined further review of that decision on November 15, 1995. *State v. Hill*, 74 Ohio St.3d 1456, 656 N.E.2d 951 (Ohio 1995) (Table).

B. Initial Habeas Proceedings

Hill filed a Notice of Intent to File a Petition for Writ of Habeas Corpus with this Court on April 18, 1996. (ECF No. 1.) He was represented [*22] by Attorneys Patricia Milhoff and George Pappas Jr. In his habeas petition, Hill reasserted his constitutional claims relating to his intellectual disability, arguing that the Ohio courts' rulings on those claims were contrary to, or an unreasonable application of, established federal law, or an unreasonable

determination of the facts. (ECF No. 18.) Another judge on this Court denied Hill's petition on September 29, 1999. (ECF No. 54.)

Hill appealed the decision to the Sixth Circuit Court of Appeals. While his appeal was pending, the Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), which barred the execution of intellectually disabled offenders. Less than two months later, on August 13, 2002, the Sixth Circuit returned Hill's case to this Court with instructions to remand Hill's unexhausted *Atkins* claim to state court and stay his remaining claims pending resolution of the *Atkins* claim. *Hill v. Anderson*, 300 F.3d 679, 683 (6th Cir. 2002). The court explained that it did not dismiss Hill's "mixed petition" of exhausted and unexhausted claims, as it is authorized to do under AEDPA's § 2254(b)(2), because "Hill's new claim should first be heard by a state court," and because [*23] the issue of Hill's intellectual disability raised "a serious question" regarding the voluntariness of his confession. *Id.* at 680, 682. The court noted that "the state of Ohio has not formally conceded that [Hill] is retarded," but that "Ohio courts reviewing his case have concluded that Danny Hill is retarded, *see, e.g.*, *Hill*, 595 N.E.2d at 901, and voluminous expert testimony supported this conclusion, J.A. at 3264-67, 3332-25, 3379-80 . . . ." *Id.* at 682. It further observed,

> A suspect's "mental condition is surely relevant to an individual's susceptibility to police coercion." *Colorado v. Connelly*, 479 U.S. 157, 165, 107 S. Ct. 515, 93 L.Ed.2d 473 (1986). State courts, including the Ohio

> Supreme Court, have clearly stated that Hill is retarded. *See Hill*, 595 N.E.2d at 901. The retarded have, "by definition . . . diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 536 U.S. at 318, 122 S. Ct. at 2250 . . .

Id. at 683. The court remarked that Hill's interactions with his uncle, Detective Morris Hill, was [*24] "of special concern." *Id.* at 682-83.

In accordance with the Sixth Circuit's remand instructions, on August 20, 2002, this Court dismissed Hill's *Atkins* claim and stayed his remaining claims pending exhaustion of his state-court remedies. (ECF No. 60.)

C. State *Atkins* Proceedings

Hill filed a petition to vacate his death sentence with the Trumbull County Court of Common Pleas on November 27, 2002, and an amended petition to vacate on January 17, 2003. (Supp. App., Disc 1, 31-32.) In his petition, he asserted that his intellectual disability is "a fact of record in his case" and that the state is thereby "barred by the doctrine of collateral estoppel from any attempt to relitigate the proven fact that [he] is a person with mental retardation." In the alternative, Hill argued the trial court should take judicial notice of the fact that he is a person with intellectual disability and/or hold a hearing on the issue of his intellectual disability. (*Id.* at 103-08.) The court appointed Attorneys James Lewis, Anthony Consoldane, and Gregory Meyers of the

Ohio Public Defender's Office to represent him. (*Id.* at 32.)

The Eleventh District Court of Appeals, in reviewing Hill's *Atkins* claims on appeal [*25] from the trial court, provided this account of Hill's state-court *Atkins* proceedings:

> On April 4, 2003, the trial court ruled that Hill's petition stated "substantive ground for relief sufficient to warrant an evidentiary hearing." The court granted the state's and Hill's requests to retain their own experts in the field of mental retardation. Over Hill's objection, the court determined to retain its own expert to evaluate Hill "pursuant to his *Atkins* claim." The court denied Hill's request to have a jury empanelled [*sic*] to adjudicate his *Atkins* claim.
>
> The state retained as its expert Dr. J. Gregory Olley, a professor at the University of North Carolina at Chapel Hill and a director of the university's Center for the Study of Development and Learning. Hill retained as his expert Dr. David Hammer, a professor at the Ohio State University and the director of psychology services at the university's Nisonger Center. The court, through the Forensic Center of Northeast Ohio, retained Dr. Nancy Huntsman, of the Court Psychiatric Clinic of Cleveland.
>
> In April 2004, Drs. Olley, Hammer, and Huntsman evaluated Hill at the Mansfield Correctional Institution for the purposes of preparing for the [*26] Atkins hearing. At this time, Hill was administered the Wechsler

Adult Intelligence Scale ("WAIS-III") IQ test, the Test of Mental Malingering, the Street Survival Skills Questionnaire, and the Woodcock-Johnson-III. The doctors concurred that Hill was either "faking bad" and/or malingering in the performance of these tests. As a result, the full scale IQ score of 58 obtained on this occasion was deemed unreliable, and no psychometric assessment of Hill's current adaptive functioning was possible. Thus, the doctors were forced to rely on collateral sources in reaching their conclusions, such as Hill's school records containing evaluations of his intellectual functioning, evaluations performed at the time of Hill's sentencing and while Hill was on death row, institutional records from the Southern Ohio Correctional Institution and the Mansfield Correctional Institution, interviews with Hill, corrections officers, and case workers, and prior court records and testimony.

The evidentiary hearing on Hill's *Atkins* petition was held on October 4 through 8 and 26 through 29, 2004, and on March 23 through 24, 2005. Doctors Olley and Huntsman testified that in their opinion, Hill is not mentally [*27] retarded. Doctor Hammer concluded that Hill qualifies for a diagnosis of mild mental retardation.

In the course of the trial, an issue arose regarding the interpretation of the results of the Vineland Social Maturity Scale test, a test designed to measure adaptive functioning and

performed on Hill four times prior to the age of 18. Hill presented the testimony of Sara S. Sparrow, Ph.D., professor emerita of Yale University, to rebut certain opinions expressed by Dr. Olley. In turn, the state called Timothy Hancock, Ph.D., executive director of the Parrish Street Clinic, in Durham, North Carolina, as a surrebuttal witness to Dr. Sparrow.

The following lay persons also testified at the hearing regarding Hill's functional abilities: corrections officer John Glenn, death row case manager Greg Morrow, death row unit manager Jennifer Sue Risinger, and corrections officer Steven Black.

On November 30, 2005, Hill filed a petitioner's supplemental authority and renewed double jeopardy motion, in which he asserted that the state is barred by the doctrine of collateral estoppel and the Double Jeopardy Clause from relitigating the issue of his mental retardation.

On February 15, 2006, the trial court [*28] issued its judgment entry denying Hill's petition for postconviction relief in which he claimed to be a person with mental retardation and rejecting his arguments regarding double jeopardy/collateral estoppel.

On March 15, 2006, Hill filed a timely notice of appeal to this court.

On August 21, 2006, Hill, acting pro se, filed a motion to withdraw the merit brief filed by counsel and a request that this court would

order a competency hearing to determine whether Hill is competent to waive all appeals and proceedings in this matter. The basis for the motion is that appointed counsel had filed a merit brief in this appeal without properly investigating Hill's "'*Atkins*' claims and/or constitutional violations."

On October 27, 2006, this court issued the following judgment entry: "The trial court is directed to promptly hold an evidentiary hearing to determine Appellant's competency to make decisions regarding his counsel and possible waiver of the right to appeal. Depending upon the outcome of that determination, the trial court shall further determine whether Appellant has actually decided to waive his right to proceed in the appeal; and whether that decision has been made voluntarily, knowingly [*29] and intelligently."

The trial court appointed Thomas Gazley, Ph.D., with the Forensic Psychiatric Center of Northeast Ohio, to evaluate Hill. Dr. Gazley interviewed Hill on two occasions in November 2006. On December 7, 2006, a hearing was held on the competency issue.

On December 8, 2006, the trial court issued a judgment entry finding that Hill is "competent to make a decision whether or not to pursue an appeal" and has, "in open court," expressed his desire to pursue an appeal from the adverse decision of the trial court on the issue of mental retardation.

> On February 1, 2007, this court overruled Hill's motion to withdraw the merit brief filed by counsel, and request that this court would order a competency hearing as moot.

State v. Hill, 177 Ohio App. 3d 171, 178-80, 2008 Ohio 3509, 894 N.E.2d 108, 113-15 (Ohio Ct. App. 2008).

On appeal to the Eleventh District Court of Appeals, Hill raised the following assignments of error:

1. The trial court erred in failing to apply double jeopardy and res judicata doctrines to prevent renewed litigation of Mr. Hill's status as a person with mental retardation.

2. The trial court erred in denying Mr. Hill a jury determination of his mental retardation status and [*30] not imposing the burden of proof on the State of Ohio to prove the absence of mental retardation beyond a reasonable doubt.

3. The trial court erred in finding that Mr. Hill was not a person with mental retardation.

4. The trial court erred in determining Mr. Hill was competent to proceed with this appeal.

(Supp. App., Disc 1, 4004-49.)

The Ohio court of appeals affirmed the trial court's decision on July 11, 2008. *Hill*, 177 Ohio App. 3d at 195, 894 N.E.2d at 127. One member of the three-judge panel, Judge Colleen Mary O'Toole, dissented from the majority's conclusion that the trial court did not err in finding that Hill was not intellectually disabled. *Id.* at 195-201, 894 N.E.2d at 127-31. She stated,

> Based on *Atkins*, executing a person with mental retardation status, regardless of context, violates the Eighth Amendment. Here, I believe the trial court abused its discretion in finding that [Hill] was not a person with mental retardation, because he met the three *Lott* criteria for classification as mentally retarded.

Id. at 201, 894 N.E.2d at 131. The Ohio Supreme Court declined to review the case on August 26, 2009, with two justices dissenting. *State v. Hill*, 122 Ohio St. 3d 1502, 2009 Ohio 4233, 912 N.E.2d 107 (Ohio 2009) [*31] (Table).

D. Resumed Habeas Proceedings

After Hill had exhausted his state-court remedies, both parties promptly moved this Court to reopen Hill's habeas action, which this Court granted on October 1, 2009. (ECF Nos. 63, 65, 68, respectively.) Attorneys Mark Vander Laan and Christopher McDowell represented Hill. On October 22, 2009, Hill moved to substitute Attorneys Vander Laan and McDowell with Attorney Dennis Sipe. (ECF No. 69.) In a telephone conference with the Court a week later, Hill withdrew his request, and the Court deemed his motion moot. (ECF No. 75.) On November 10, 2009, Hill filed a motion pro se "to stop all proceedings." (ECF No. 77.) The Court conducted a telephone conference with all parties on November 20, 2009, during which Hill withdrew his motion to dismiss his habeas action and requested the Court substitute the Ohio Federal Public Defender's Office as his counsel. The Court granted Hill's motion to substitute counsel and denied his motion to dismiss his case. (ECF No. 85.)

On February 24, 2010, Hill moved for an extension of time until March 15, 2010, in which to file an amended habeas petition, which the Court granted. (ECF Nos. 89, 90.) On March 4, 2010, Hill [*32] filed an affidavit with the Court, asking it again "to stop all proceedings." He explained that he believed his counsel were not ready to file an amended habeas petition before the approaching deadline and they were not following his instructions. (ECF No. 91.) Hill's counsel filed a response four days later, explaining their client's confusion. (ECF No. 92.) Hill then filed another motion to stop the proceedings on March 12, 2010, without providing any basis for the motion. (ECF No. 93.) The Court denied the motion on March 24, 2010, noting Hill's frequent, and disruptive, attempts to substitute counsel and dismiss his appeals. (ECF No. 96.)

On March 15, 2010, Hill filed an Amended Petition for Writ of Habeas Corpus in this Court. In it, he asserts three claims: 1) that the death sentence imposed against him violates the Eighth Amendment under *Atkins* due to his intellectual disability; 2) that counsel assigned to represent him at the state *Atkins* hearing rendered ineffective assistance of counsel by failing to investigate and to present compelling and relevant evidence in support of the *Atkins* claim; and 3) that he is actually innocent of the death penalty because he is mentally retarded. [*33] (ECF No. 94.) Respondent filed a Supplemental Return of Writ Regarding Atkins Claim on April 30, 2010. (ECF No. 98.) After requesting and receiving an extension of time, Hill filed a Traverse on August 2, 2010, and a Supplement to Traverse on August 5, 2010. (ECF Nos. 102 and 103, respectively.)

On September 9, 2010, Hill requested an extension of time to file motions. (ECF No. 114.) Respondent opposed the motion, and the Court denied it on September 13, 2010. (ECF Nos. 115 and 116, respectively.) Hill then filed several motions with the Court on September 20, 2010. He sought to expand the record with various declarations supporting his *Atkins* claims. (ECF Nos. 119 and 120.) Hill also requested discovery to support his *Atkins* claims and his *Atkins*-related ineffective-assistance claim. (ECF No. 117.) And he sought an evidentiary hearing on his *Atkins* claims. (ECF No. 118.) On October 4, 2010, Hill filed a motion to supplement his motions for evidentiary hearing and expansion of the record. (ECF No. 129.) Respondent opposed all motions. (ECF Nos. 123, 125, 131.)

This Court ruled on Hill's motions on December 14, 2010. It denied Hill's motion to expand the record, concluding that "Petitioner [*34] cannot show that he was not at fault for failing to develop the record" at the state *Atkins* hearing and therefore did not satisfy 28 U.S.C. § 2254(e)(2)'s requirements that a petitioner demonstrate that the factual predicates of his claim could have been previously discovered through the exercise of due diligence, and that he is actually innocent. (ECF No. 132, 13.) The Court also denied Hill's discovery request concerning his *Atkins*-related ineffective-assistance claim during post-conviction proceedings, because "Petitioner is not entitled to effective assistance of counsel during post-conviction proceedings and the issue cannot be heard on habeas review." (*Id.* at 15.) It granted discovery relating to the *Atkins* claims generally, however, as the information, if fully developed, may entitle Hill to relief. (*Id.* at 16.) Finally, it denied without prejudice

Hill's motion for an evidentiary hearing because, again, Hill did not meet the criteria of § 2254(e)(2). (*Id.* at 17.)

Hill notified the Court that he had completed discovery on April 13, 2011. (ECF No. 135.) On April 27, 2011, Hill moved to expand the record with the discovery obtained, which the Court granted "for the sole purpose [*35] of determining whether an evidentiary hearing is appropriate in this matter." (ECF Nos. 140 and 145, respectively.)

On May 23, 2012, Hill requested that the Court reconsider its December 14, 2010, ruling regarding his requests for discovery and to expand the record "in relation to" his ineffective-assistance claim in light of the recent United States Supreme Court decision in *Martinez v. Ryan*, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). (ECF No. 146, 1.) The Court denied Hill's request on July 10, 2012. (ECF No. 148.)

III. Petitioner's Grounds for Relief

Hill asserts three grounds for relief. They are:

> 1. Mr. Hill is mentally retarded and thus ineligible for the death penalty. Mr. Hill's sentence of death violates his right to be free from cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.
>
> 2. Court appointed *Atkins* counsel rendered ineffective assistance to Mr. Hill, and the trial court allowed for the continued representation of *Atkins* counsel in spite of knowing that there was a complete and absolute breakdown

> in the attorney-client relationship, thereby denying Hill his right to counsel in violation of his Sixth, Eighth and Fourteenth Amendment [*36] Rights.
>
> 3. Because Mr. Hill is mentally retarded, he is innocent of the death penalty.

(ECF No. 94, *passim.*)

IV. Standard of Review

Hill's Amended Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), since it was filed after the Act's effective date. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997); *Murphy v. Ohio*, 551 F.3d 485, 493 (6th Cir. 2009). AEDPA, which amended 28 U.S.C. § 2254, was enacted "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and 'to further the principles of comity, finality, and federalism.'" *Woodford v. Garceau*, 538 U.S. 202, 206, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003) (quoting (*Michael*) *Williams v. Taylor*, 529 U.S. 362, 386, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). As the United States Supreme Court recently explained, the Act "recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights." *Burt v. Titlow*, 134 S. Ct. 10, 15, 187 L. Ed. 2d 348 (2013). AEDPA, therefore, "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Id.*

One of AEDPA's most significant limitations on the federal courts' authority to issue writs of habeas [*37] corpus is found in § 2254(d). That provision

forbids a habeas court from granting relief with respect to a "claim that was adjudicated on the merits in State court proceedings" *unless* the state-court decision either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Habeas courts review the "last *explained* state-court judgment" on the federal claim at issue. *Ylst v. Nunnemaker*, 501 U.S. 797, 805, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991) (emphasis original).

A state-court decision is contrary to "clearly established federal law" under § 2254(d)(1) only "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. Even if the state court identifies the "correct governing legal principle," a federal habeas court may [*38] still grant the petition if the state court makes an "unreasonable application" of "that principle to the facts of the particular state prisoner's case." *Id.* at 413. A state-court decision also involves an unreasonable application if it unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a

new context where it should apply. *Id.* at 407. As the Supreme Court has advised, "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) (citing *Williams*, 529 U.S. at 410). "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011).

A state-court decision is an "unreasonable determination of the facts" under § 2254(d)(2) only if the court made a "clear factual error." *Wiggins v. Smith*, 539 U.S. 510, 528-29, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Review under this clause, as its plain language indicates, also is limited [*39] to "the evidence presented in the State court proceeding." Furthermore, the petitioner bears the burden of rebutting the state court's factual findings "by clear and convincing evidence." *Burt*, 134 S. Ct. at 15; *Rice v. White*, 660 F.3d 242, 250 (6th Cir. 2011). This requirement mirrors the "presumption of correctness" AEDPA affords state-court factual determinations, which only can be overcome by clear and convincing evidence.[5] 28 U.S.C. § 2254(e)(1). The Supreme Court repeatedly has declined to define the

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[5] Section 2254(e)(1) provides: "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

"precise relationship" between § 2254(d)(2) and § 2254(e)(1). *Burt*, 134 S. Ct. at 15; *see also Wood v. Allen*, 558 U.S. 290, 300, 130 S. Ct. 841, 175 L. Ed. 2d 738 (2010). It has explained, however, that it is

> incorrect . . ., when looking at the merits, to merge the independent requirements of § 2254(d)(2) and (e)(1). AEDPA does not require a petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions.

Miller-El v. Cockrell, 537 U.S. 322, 341, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). "[A] decision adjudicated on the merits in a state court and [*40] based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the sate-court proceeding." *Id.* at 340. In addition, "it is not enough for the petitioner to show some unreasonable determination of fact; rather, the petitioner must show that the resulting state court decision was 'based on' that unreasonable determination." *Rice*, 660 F.3d at 250. And, as Supreme Court has cautioned, "'a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.'" *Burt*, 134 S. Ct. at 15 (quoting *Wood*, 558 U.S. at 301).

Indeed, the Supreme Court repeatedly has emphasized that § 2254(d), as amended by AEDPA, is an intentionally demanding [*41] standard,

affording great deference to state-court adjudications of federal claims. In *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), the Supreme Court held that as long as "fairminded jurists could disagree on the correctness of the state court's decision," then relief is precluded under that provision. *Id.* at 786 (internal quotation marks omitted). The Court admonished that a reviewing court may not "treat[] the reasonableness question as a test of its confidence in the result it would reach under de novo review," and that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 785. Rather, § 2254(d) "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems" and does not function as a "substitute for ordinary error correction through appeal." *Id.* (internal quotation marks omitted). Thus, a petitioner "must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786-87. This is a very high standard, which the Court readily acknowledges: [*42] "If this standard is difficult to meet, that is because it is meant to be." *Id.* at 786.

Nevertheless, the Supreme Court recognized in *Harrington* that AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." *Id.* at 786. "[E]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El*, 537 U.S. at 340. Rather, "under AEDPA standards, a federal court can disagree with

a state court's factual determination and 'conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.'" *Baird v. Davis*, 388 F.3d 1110, 1123 (7th Cir. 2004) (quoting *Miller-El*, 537 U.S. at 340) (Posner, J.).

In addition to § 2254(d)'s limitations, AEDPA precludes habeas review of some claims that have not been properly exhausted before the state courts, or were procedurally barred by the state courts. Section 2254(b)(1) provides that a federal court may not award habeas relief to an applicant in state custody "unless it appears that — the applicant has exhausted the remedies available in the courts [*43] of the State; or there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1); *see also Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). Thus, exhaustion is fulfilled once a state supreme court provides a convicted defendant an opportunity to review his or her claims on the merits. *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). If under state law there remains a remedy that a petitioner has not yet pursued, exhaustion has not occurred and the federal habeas court cannot entertain the merits of the claim. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). Rather than dismiss certain claims the court deems unexhausted, however, a habeas court need not wait for exhaustion if it determines that a return to state court would be futile. *Lott v. Coyle*, 261 F.3d 594, 608 (6th Cir. 2001).

In circumstances where the petitioner has failed to present a claim in state court, a habeas court may deem that claim procedurally defaulted because the Ohio state courts would no longer entertain the claim. *Buell v. Mitchell*, 274 F.3d 337, 349 (6th Cir. 2001). To obtain a merit review of the claim, the [*44] petitioner must demonstrate cause and prejudice to excuse his failure to raise the claim in state court, or that a miscarriage of justice would occur were the habeas court to refuse to address the claim on its merits. *Seymour v. Walker*, 224 F.3d 542, 550 (6th Cir. 2000) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)).

Also, even where a state prisoner exhausts available state-court remedies, a federal court may not consider "contentions of general law which are not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." *Wainwright*, 433 U.S. at 87. If a

> state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). To be independent, a state procedural rule and the state courts' application of it "must rely in no part on federal law." [*45] *Fautenberry v. Mitchell*, No. C-1-00-332, 2001 U.S. Dist. LEXIS 25700, 2001 WL 1763438, at * 24

(S.D. Ohio Dec. 26, 2001) (citing *Coleman*, 501 U.S. at 732-33). To be adequate, a state procedural rule must be "'firmly established and regularly followed'" by the state courts at the time it was applied. *Beard v. Kindler*, 558 U.S. 53, 60, 130 S. Ct. 612, 175 L. Ed. 2d 417 (2009). If a petitioner fails to fairly present any federal habeas claims to the state courts but has no remaining state remedies, then the petitioner has procedurally defaulted those claims. *O'Sullivan*, 526 U.S. at 848; *Rust*, 17 F.3d at 160.

The Court will address the issues of exhaustion and procedural default presented in this case when it reviews Hill's individual claims.

V. Analysis of Petitioner's Grounds for Relief

A. *First Ground for Relief:* Atkins *Claim*

Hill's first claim for relief is that he is intellectually disabled pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), and therefore ineligible for execution. Hill raised this claim on post-conviction and appealed it to the Eleventh District Court of Appeals and the Ohio Supreme Court. This claim is therefore preserved for federal habeas review.

1. Legal Standards: *Atkins* and *Lott*

In *Atkins v. Virginia*, the United States Supreme [*46] Court held that, in light of "our evolving standards of decency," executing the intellectually disabled violates the Eighth Amendment's ban on cruel and unusual punishment. *Atkins*, 536 U.S. at 321. The Court recognized a national consensus that intellectually disabled persons are "categorically less culpable than the average criminal." *Id.* at 316. It explained,

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 318. The Court also found intellectually disabled [*47] offenders at "special risk of wrongful execution." *Id.* at 320. It pointed to the possibility of false confessions; the defendant's difficulty in persuasively showing mitigation, providing meaningful assistance to counsel, and testifying; and his or her demeanor, which may create an unwarranted impression of lack of remorse. *Id.* at 320-21. The Court concluded that given the impairments of intellectually disabled individuals, executing them would not "measurably advance the deterrent or the retributive purpose of the death penalty." *Id.* at 321.

The *Atkins* Court acknowledged the difficulties inherent in defining intellectual disability. It stated,

> To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. . . . Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.

Id. at 317. But it did not define the condition. Instead, as it did in the context of mental competency, the Court entrusted the states with "'the task of developing appropriate ways to enforce the constitutional restriction [*48] upon [their] execution of sentences.'" *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986)).

The Court did, however, point states to the clinical definitions of intellectual disability promulgated by the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association ("APA").[6] *Id.* at 308 n.3 (citing AAMR,

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[6] The Court observed:

> The American Association on Mental Retardation (AAMR) defines intellectual disability as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." . . .
>
> The American Psychiatric Association's definition is similar: The essential feature of Mental Retardation is

Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992) (hereinafter, "AAMR 1992 Manual") and APA, *Diagnostic and Statistical Manual of Mental Disorders* 41-43 (4th ed. 2000) (hereinafter, "DSM-IV-TR")). It explained that those criteria "require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id.* at 318. It noted that "[existing state] statutory definitions of mental retardation are not identical, but generally conform to [those] clinical definitions . . . ."[7] *Id.* at 317 n.22. In its recent

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> significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community [*50] resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." . . . "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70.

Id. at 308 n.3 (citations omitted).

[7] The AAMR has cautioned, however, that "[t]he field of mental retardation is currently in a state of flux regarding not just a fuller understanding of the condition of mental retardation, but also the language and process used in naming, defining, and classifying" the condition. AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* xiii (10th ed. 2002) (hereinafter, "AAMR 2002 Manual"). At the heart of this evolving field is the very definition of intellectual disability, which has been revised nine times since 1908. *Id.* at 20-23. Since *Atkins* was decided, the AAMR has updated its

decision in *Hall v. Florida*, the Supreme Court explained that these clinical definitions of intellectual disability "were a fundamental premise of *Atkins*." *Hall v. Florida*, 134 S. Ct. 1986, 1999, 188 L. Ed. 2d 1007 (U.S. 2014). [*49] The Court stressed in *Hall* that a court's legal determination of the condition, "although distinct from a medical diagnosis," must be "informed" by "the views of medical experts" and "the medical community's diagnostic framework." *Id.* at 19-20.

Soon after *Atkins* was [*52] decided, the Ohio Supreme Court established the "substantive standards and procedural guidelines" for Eighth Amendment intellectual disability claims in Ohio in *State v. Lott*, 97 Ohio St. 3d 303, 305, 2002 Ohio

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manual twice: a tenth edition was published in 2002, and an eleventh edition in 2010. AAMR 2002 [*51] Manual; AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Support* (11th ed. 2010) (hereinafter, "AAMR 2010 Manual"). The APA published a fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (hereinafter, "DSM-V") in 2013. Many of the most recent changes to the clinical definitions of intellectual disability, as articulated in these updated guidelines, concern the criteria for adaptive behavior, which the Court will examine in more detail below.

In addition, as already noted, mental retardation is now commonly referred to as intellectual disability. *See supra* n.1. *See also* AMMR 2002 Manual, 5 ("The history of the condition we now know as mental retardation is replete with name changes, including feebleminded, mental defective, mentally deficient, and others. These new names arose as new theoretical frameworks appeared and older names came to signal stigma and distorted power relationships."). The AAMR has changed its name accordingly, to the American Association on Intellectual and Developmental Disabilities ("AAIDD"), although the Court will refer to the organization as AAMR throughout this opinion for consistency.

6625, 779 N.E.2d 1011, 1014 (Ohio 2002). The court adhered to the clinical definitions cited with approval in *Atkins*, holding that to prevail on an *Atkins* claim, the defendant must prove that he or she: (1) suffers from "significantly subaverage intellectual functioning," (2) experienced "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction," and (3) manifested "onset before the age of 18." *Id.* The court noted, however, that "[w]hile IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue." *Id.* It therefore held that "there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70." *Id.*

Because Lott's trial occurred before *Atkins* was decided, the Ohio Supreme Court determined that his *Atkins* hearing would be conducted before the trial court pursuant to Ohio's post-conviction procedures. *Id.* It further held that the [*53] trial court should conduct a de novo review of the evidence, "rely[ing] on professional evaluations of Lott's mental status, and consider[ing] expert testimony, appointing experts if necessary, in deciding this matter." *Id.* at 306, 779 N.E.2d at 1015. The court also held that the trial court, not a jury, would decide if a petitioner is intellectually disabled, and the petitioner bears the burden of proving his or her intellectual disability by a preponderance-of-the-evidence standard. *Id.*

2. § 2254(d)(1): Reasonableness of Ohio court's application of Supreme Court precedent

Hill asserts, "To the extent that the state procedures themselves used to render the factual findings of the mental retardation clinical components contributed to and fostered inaccurate and unreliable factfinding by the trial court, the procedures violated clearly established federal law of" *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007), and *Atkins* under § 2254(d)(1). (ECF No. 94, 15.) In *Ford* and *Panetti*, the Supreme Court held that state proceedings used to determine capital inmates' competency for execution must provide procedural due process protections. *See Ford*, 477 U.S. at 411-12; [*54] *Panetti*, 551 U.S. at 949. This argument lacks merit.

First, Hill does not clearly identify which state procedures violated these principles in his case. But even so, there is no "clearly established Federal law, as determined by the Supreme Court" on this issue, and § 2254(d)(1) does not apply. *See Williams v. Mitchell*, No. 1:09 CV 2246, 2012 U.S. Dist. LEXIS 141852, 2012 WL 4505774, at **22-28 (N.D. Ohio Sept. 28, 2012) (Nugent, J.). The Supreme Court has not addressed whether or to what extent *Ford*'s due process requirements extend to state-court determinations of intellectual disability under *Atkins*.[8] To the contrary, in *Bobby v. Bies*, 556 U.S.

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[8] The Sixth Circuit has not addressed this issue either. Other circuit courts are split on the issue. *Compare Rivera v. Quarterman*, 505 F.3d 349, 358 (5th Cir. 2007) (noting that

825, 129 S. Ct. 2145, 173 L. Ed. 2d 1173 (2009), the Court continued to emphasize that states themselves are responsible for "developing appropriate ways to enforce [*Atkins*'] constitutional restriction," and implicitly approved of Ohio's standard for intellectual disability claims. *Id.* at 831 (quoting *Atkins*, 536 U.S. at 317). *See also Schriro v. Smith*, 546 U.S. 6, 9, 126 S. Ct. 7, 163 L. Ed. 2d 6 (2005) ("States, including Arizona, have responded to that challenge by adopting their own measures for adjudicating claims of mental retardation. While those measures *might*, in their application, be subject to constitutional challenge, Arizona [*55] had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition.") (emphasis added).

Moreover, even assuming that *Ford* and *Panetti* do apply here, this Court finds that the Ohio courts' adjudication of Hill's *Atkins* claim [*56] comported with the due process right to a "fair hearing" guaranteed in *Ford*. *See Ford*, 477 U.S. at 424 (Powell, J., concurring). Hill, assisted by appointed counsel and two appointed expert witnesses,

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"[e]ven though Atkins did not specifically mandate any set of procedures, it was decided against the backdrop of the Supreme Court's and lower court's due process jurisprudence"), *and Ochoa v. Workman*, 669 F.3d 1130, 1143 (10th Cir. 2012) (finding that Fourteenth Amendment due process protections are applicable in *Atkins* hearings, at least with respect to Oklahoma's decision to provide a right to a jury in such hearings); *with Hill v. Humphrey*, 662 F.3d 1335, 1360 (11th Cir. 2011) (distinguishing *Ford* and *Panetti* and holding that "[h]ere, by contrast, *Atkins* established only a substantive Eighth Amendment right for the mentally retarded, not any minimum procedural due process requirements for bringing that Eighth Amendment claim").

conducted substantial briefing and discovery regarding his claim. (*See* Supp. App., Disc 1, 1-33.) The trial court, in accordance with the procedures established in *Lott*, held a twelve-day hearing, at which Hill submitted more than 500 pages of evidence. (*See id.* at 486-1013.) At its conclusion, the trial court issued an 84-page opinion, which thoroughly examined the evidence and explained its decision. (*See id.* at 3399-3483.) Hill then was provided with appointed counsel to appeal this decision to two higher state courts. (*See id.* at 3496-4517.) Thus, Hill was provided a full and fair opportunity to develop and present his *Atkins* claim in state court, and this claim fails.

3. § 2254(d)(2): Reasonableness of Ohio court's factual determinations regarding Hill's intellectual disability

As Hill concedes in his Traverse, his *Atkins* claim is more appropriately addressed as it relates to the Ohio appellate court's factual analysis under § 2254(d)(2). (ECF No. 102, 47.) Hill's primary argument [*57] under *Atkins* is that the "historical data and uncontroverted evidence demonstrated that Mr. Hill meets the criteria established under psychological terms and under state law." (ECF No. 94, 20.) Respondent, in his six-page Return of Writ, counters Hill's claim simply by referring the Court to the "wealth of evidence" in the state-court record, the trial court's opinion, and audio and video recordings of Hill speaking to the trial court judge and a newspaper reporter. (ECF No. 98, 5.)

The Court first must determine the standards that govern its review of Hill's claim under § 2254(d)(2). Respondent, in his Return of Writ's only

well-developed argument, contends that the Supreme Court decision in *Wood v. Allen*, 558 U.S. 290, 130 S. Ct. 841, 175 L. Ed. 2d 738 (2010), "can fairly be read to say" that under § 2254(d)(2), a state-court finding is reasonable "if there is evidence in the State court record to support it." (*Id.* at 4.) The Court disagrees.

In *Wood*, the Court held that, "[r]eviewing all of the evidence, . . . even if it is debatable," a state court's conclusion that the petitioner's counsel made a strategic decision not to investigate further into, or present to the jury, information contained in a report about the [*58] petitioner's mental deficiencies was not unreasonable under § 2254(d)(2). *Wood*, 558 U.S. at 303. In doing so, the Court addressed the standard of review under § 2254(d)(2). It declined to reach the question of whether the "arguably more deferential" clear-and-convincing-evidence standard of § 2254(e)(1) "applies in every case presenting a challenge under § 2254(d)(2)," because its "view of the reasonableness of the state court's factual determination in this case [did] not turn on any interpretive difference regarding the relationship between these provisions." *Id.* at 300-01. But it "assume[d] for the sake of argument that the factual determination at issue should be reviewed . . . only under § 2254(d)(2) and not under § 2254(e)(1)." *Id.* at 301. The Court also acknowledged that "[t]he term 'unreasonable' is no doubt difficult to define." *Id.* at 301 (quoting *Williams*, 529 U.S. at 410)). But it stressed: "It suffices to say, however, that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Id.* The Court explained,

> In *Rice [v. Collins*, 546 U.S. 333, 339, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006)], for example, in [*59] which we assumed, *arguendo*, that only § 2254(d)(2) and not § 2254(e)(1) applied, . . . we rejected the Ninth Circuit's conclusion that a state-court factual determination was unreasonable. We noted that even if "[r]easonable minds reviewing the record might disagree" about the finding in question, "on habeas review that *does not suffice* to supersede the trial court's . . . determination." [*Id.* at 341-42.]

Id. (emphasis added). The Court also observed, "As for any evidence that may plausibly be read as inconsistent with the [state-court] finding that counsel made a strategic decision, we conclude that *it does not suffice* to demonstrate that the finding was unreasonable." *Id.* at 302-03 (emphasis added).

Thus, the Court in *Wood* did not state, as Respondent argues, that a state-court factual determination is reasonable if *any evidence* exists to support it. Rather, it reiterated that a habeas court, after reviewing *all of the evidence*, must find *sufficient* evidence of unreasonableness to warrant relief under § 2254(d)(2), and that is more evidence than would make the state-court decision merely debatable or would lead the habeas court to a different result. Respondent's interpretation of *Wood*, [*60] though offering bright-line clarity, would render § 2254(d)(2)'s standard virtually insurmountable, extending deference nearly to the point of "abandonment or abdication of judicial review." *Miller-El*, 537 U.S. at 340.

In this case, then, under § 2254(d)(2), the Court must review "the evidence presented in the State court proceeding" to determine whether the state court's adjudication of Hill's *Atkins* claim "was based on an unreasonable determination of the facts." The state-court decision at issue is from the Eleventh District Court of Appeals, which was the last Ohio court to render an explained judgment regarding Hill's claim. *Ylst*, 501 U.S. at 805. Hill bears the burden of rebutting that court's particular factual *findings* "by clear and convincing evidence." *Burt*, 134 S. Ct. at 15; *Rice*, 660 F.3d at 250. The Court is limited in its review to "the evidence presented in the State court proceeding."[9] 28 U.S.C. § 2254(d)(2). "[I]t is not enough for [Hill] to show some unreasonable determination of fact; rather, [he] must show that the resulting state court decision was 'based on' that unreasonable determination." *Rice*, 660 F.3d at 250. Ultimately, Hill must show that the *decision as [*61] a whole* was unreasonable. *Miller-El*, 537 U.S. at 341; *see also Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011). And "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood*, 558 U.S. at 301.

The Court now examines the Ohio court of appeals' review of the state trial court's ruling that Hill had not met his burden of proving, by a preponderance of the evidence, that he was intellectually disabled, as defined by: (1) significantly subaverage intellectual functioning; (2) significant

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[9] The Court, therefore, will not consider any of the new evidence Hill submitted in support of his petition.

limitations in two or more adaptive skills; and (3) onset before the age of 18. *Lott*, 97 Ohio St. 3d at 305.

a. significant subaverage intellectual functioning

The Ohio court of appeals agreed with the trial court that Hill met the first criterion for intellectual disability under *Lott*. The court stated,

> With respect to the first criterion, significantly subaverage intellectual functioning is clinically defined as an IQ below 70. FN2 FN2. More precisely, significantly subaverage intellectual functioning [*62] is defined as two standard deviations below the mean for the general population, i.e. an adjusted score of 100 on a standardized test. A single deviation is considered 15 points. Two deviations means a score of 70 or lower. It should also be noted that an IQ score below 70 is not determinative of a diagnosis of mental retardation. *Cf. Lott*, 97 Ohio St.3d 303, 2002 Ohio 6625, 779 N.E.2d 1011, at 1014 (holding "that there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70").
>
> Hill's IQ was measured nine times between 1973, when he was six years old, and 2000, when he was 33 years old. The scores range from 48 to 71, with the mean being 61.12. In April 2004, Hill scored a 58 on the Wechsler Adult Intelligence Scale. Drs. Hammer, Olley, and Huntsman all agreed that this result was unreliable due to Hill's intentionally trying to obtain a low score.

Hill, 177 Ohio App. 3d at 188-89, 894 N.E.2d at 121. Neither Hill nor Respondent challenges this determination. (*See* ECF No. 94, 21; ECF No. 98, 1.)

b. adaptive skills deficit

The Ohio appellate court also agreed with the trial court that Hill failed to meet, by a preponderance of the evidence, the second [*63] criterion for intellectual disability under *Lott*, which requires the offender to demonstrate "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction." *Lott*, 97 Ohio St. 3d at 305, 779 N.E.2d at 1014. It found "abundant competent and credible evidence" supporting the trial court's decision. *Hill*, 177 Ohio App. 3d at 194, 894 N.E.2d at 126.

Hill argues that the state appellate court's factual determination regarding his adaptive behavior was unreasonable. (ECF No. 94, 21.) In particular, he complains that the court failed to properly apply the clinical guidelines, and that, in the absence of reliable test results regarding adaptive functioning, the court "engaged in its own analysis of anecdotal evidence of Mr. Hill's deficits in adaptive behavior . . ., contrary to the record . . . ." (*Id.* at 37.)

The Supreme Court has defined "adaptive behavior" as "an individual's ability or lack of ability to adapt or adjust to the requirements of daily life, and success or lack of success in doing so." *Hall*, 134 S. Ct. at 1991. *See also* AAMR 2010 Manual, 43 (AAMR defining adaptive behavior as "the collection of conceptual, social, and practical skills [*64] that have been learned and are performed by people in their everyday lives"); DSM-V, 37 (APA defining it as "how well a person meets community standards of

personal independence and social responsibility, in comparison to others of similar age and sociocultural background"). The concept of adaptive behavior is considered "one of the most subjective essential elements of mental retardation," and was not added to the AAMR definition until 1959. *Holladay v. Campbell*, 463 F. Supp. 2d 1324, 1329 (N.D. Ala. 2006); *see also* AAMR 1992 Manual, 38. It, like the definition of intellectual disability itself, has undergone many revisions.

In its 1992 manual, the AAMR assessed adaptive behavior based on ten skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. AAMR 1992 Manual, 38. In 2002, the AAMR grouped these adaptive skills into three general categories: conceptual, social, and practical. "Conceptual skills" include language, reading and writing, money concepts, and self-direction. "Social skills" include interpersonal relationships, personal responsibility, self-esteem, gullibility and naivete, [*65] following rules, obeying laws, and avoiding victimization. And "practical skills" include daily activities such as eating, personal hygiene, dressing, meal preparation, housekeeping, transportation, taking medication, money management, and telephone use, as well as occupational skills and maintaining a safe environment. AAMR 2002 Manual, 82. Under this standard, a significant deficit in only one of these groups satisfied the adaptive behavior criteria for intellectual disability. *Id.* at 78. The AAMR did not change its definition of adaptive behavior in the 2010 edition of its manual. *See* AAMR 2010 Manual, 43.

In the DSM-IV-TR, the APA also measured adaptive behavior based on various skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. DSM-IV-TR, 41. It revised the criteria in the DSM-V, closely following the AAMR's new construct of three broad skill groups. It now provides,

> Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical. The *conceptual (academic) domain* involves competence in memory, language, reading, [*66] writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others.

DSM-V, 37.

In this case, the Ohio court of appeals quoted *Lott*'s standard for adaptive limitations—"significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction"—under the definition of intellectual disability derived from the AAMR 1992 Manual and the DSM-IV-TR. *Hill*,

177 Ohio App. 3d at 189, 894 N.E.2d at 121. The court also cited the AAMR 2002 Manual's revised definition of adaptive functioning. *Id.* at n.3. It did not, however, identify which of these standards it was applying. And there is no precedent in Ohio law or from the Sixth Circuit regarding which definition of adaptive behavior [*67] should be applied in this context. Nevertheless, despite minor differences between the standards,[10] courts generally have not distinguished between them. *See, e.g., Wiley v. Epps*, 625 F.3d 199, 216 n.13 (5th Cir. 2010) (noting that the two definitions "look at the same adaptive behavior"); *United States v. Davis*, 611 F. Supp. 2d 472, 490 (D. Md. 2009) (finding these classifications "essentially measure the same skills"); *Thomas v. Allen*, 614 F. Supp. 2d 1257, 1314-15 (N.D. Ala. 2009) (observing that the 1992 and 2002 AAMR definitions "share a common conceptual linkage"). This Court finds that, although the later guidelines provide useful clarification, the experts engaged in Hill's case most often referenced the 1992 AAMR standard for adaptive behavior cited in *Atkins* and *Lott*. *See Wiley*, 625 F.3d at 216; *Thomas*, 614 F. Supp. 2d at 1315. By that standard, therefore, Hill was required to show by a preponderance of the evidence deficits in at least two out of the ten skill areas of adaptive behavior listed above.

Significantly, the Ohio courts assessed Hill's adaptive skills as they existed at the time of the hearing. Hill had filed a pretrial motion with the

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[10] The experts in this case agreed that the AAMR 2002 Manual provided a slightly more stringent standard of adaptive deficiencies than the AAMR 1992 Manual. (Supp. App., Disc [*68] 1, Tr., 592-93; 1509-10.)

trial court arguing that the correct time frame in which to analyze his intellectual disability for purposes of his *Atkins* claim was at the time of the offense. (Supp. App., Disc 1, 228-37.) The State countered that the court should focus on Hill's present mental status. (*Id.* at 217-23.) The court, in ruling on the matter, noted that neither *Atkins* nor *Lott* addresses the time frame at which a finding of metal retardation is relevant. It decided that it would determine whether Hill was intellectually disabled "at the time [he] filed [his] claim,"[11] although it stated that it would not "totally disregard, or even preclude testimony concerning [Hill's] mental status at the time of the offense . . . or . . . as to his childhood and adolescent development." (*Id.* at 249-50.) The state court of appeals did not address the temporal issue at all, and considered evidence from Hill's entire life. Hill does not contest the trial court's decision regarding this issue. (*See* ECF No. 94, 15.)

(1) adaptive skills testing

The Ohio court of appeals began its analysis of Hill's adaptive behavior by discussing the results of tests used to assess Hill's adaptive skills, both those performed during his childhood and those performed pursuant to his *Atkins* proceedings. *Hill*, 177 Ohio App. 3d at 189-91, 894 N.E.2d at 122-24. Indeed, the AAMR prefers that practitioners use standardized testing to assess adaptive skills, which measure the

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[11] As noted above, Hill filed his *Atkins* [*69] claim in state court on January 17, 2003. (Supp. App., Disc 1, 31-32.) He was 36 years old. The hearing on his claim took place about two years later, beginning on October 4, 2004, and concluding on July 15, 2005. (*Id.* at 132, 1791.)

subject's functioning against the general population. AAMR 2002 Manual, 76. The court, however, rejected the results of the tests as unreliable. The experts retained to evaluate Hill agreed that the results of the tests they performed were unreliable, because, as Dr. Olley reported, Hill "did not give his best effort to the tests or . . . he made a planned effort to score low." (Supp. App., Disc 1, 1224.) They also agreed, and Hill concedes, that Hill's earlier test results were not valid.[12] (*See, e.g.*, ECF No. 94, 21.) [*70] Two psychologists tested Hill's adaptive functioning when he was a child, but deemed the results unreliable because the informant was Hill's mother, who also was intellectually disabled and, they believed, overstated Hill's abilities. (*Id.* at 515, 522, 527.) And Drs. Olley and Hammer agreed that the other early adaptive skills tests also were unreliable because the informant was not identified. (*Id.*, Tr., 309, 431, 1779.)

The appellate court noted, therefore, that the trial court "[a]lternatively" favored "the more credible testimony of the other experts who concluded that Hill's adaptive capabilities are greater than those of a person with mental retardation." *Hill*, 177 Ohio App. 3d at 191, 894 N.E.2d at 123. But before it addressed the expert testimony, the court summarized the anecdotal evidence presented at Hill's hearing.

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[12] This renders moot Hill's argument that the court of appeals incorrectly held that the trial court did not abuse its discretion in rejecting the rebuttal testimony of Dr. Sparrow that Hill's older adaptive test scores could be recalculated to reflect updated scores that would place him within the intellectually disabled range. (*Id.* at 33-35.)

(2) [*71] anecdotal evidence

In reviewing the anecdotal evidence of Hill's adaptive functioning, the Ohio court first explained,

> Apart from the problematic standardized measurements of Hill's adaptive skills, the trial court and the expert witnesses had to rely on collateral, largely anecdotal evidence to determine the level of Hill's adaptive functioning. The trial court acknowledged that such evidence constituted a "thin reed" on which to make conclusions about Hill's diagnosis, but also recognized that this situation was the result of Hill's failure to cooperate with the experts retained to evaluate him.FN5 This court further emphasizes that the burden was on Hill to demonstrate that he is mentally retarded, not on the state to prove that he is not mentally retarded.
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> FN5. Hill's own expert, Dr. Hammer, testified that the results of Hill's performance on the Test of Memory Malingering ("TOMM") "casts doubt on all the testing information collected from Mr. Hill during the evaluation process."

Id.

As a preliminary matter, the Court points out that the state-court record was hardly a "thin reed." At well over 6,000 pages, it was voluminous. The experts agreed that it was larger than those in most [*72] capital cases in which intellectual disability is at issue. (*See* Supp. App., Disc 1, Tr., 468-69 (Hammer test.); 833-34 (Olley test.); 1196 (Huntsman test.); 1429-30 (testimony of Sara S.

Sparrow, Ph.D. (hereinafter, "Sparrow test.")).) And while it is true that the record contains many subjective, "anecdotal" observations of Hill's academic performance, conduct, and behavior, much of that anecdotal information was provided in reports prepared by, and testimony of, both private- and public-sector psychiatrists, psychologists, social workers, and educators to support their professional opinions.

This is precisely the type of information that experts are supposed to rely on in the absence of reliable test scores. The Supreme Court in *Hall* described the "substantial and weighty evidence" of adaptive functioning that courts should consider in determining intellectual disability as "including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances." *Hall*, 134 S. Ct. at 1999. It noted that "the medical community accepts that all of this evidence can be probative of intellectual disability . . . ." *Id.* Indeed, the AAMR recognizes [*73] that some situations call for a retrospective diagnosis, in which "formal assessment is less than optimal." AAIDD, *User's Guide*, 17-18 (10th ed. 2007) (hereinafter, "AAIDD User's Guide").[13] It directs practitioners in those situations to conduct a thorough review of the subject's social history and school records, as the experts and court did here. AAIDD User's Guide, 18-20.

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[13] None of the experts who testified in this case explicitly referred to the AAIDD User's Guide, but their reports and testimony substantially adhere to the AAMR/AAIDD guidelines.

In fact, as will be explained in more detail below, the true "thin reed" in this case was the information that was available concerning Hill's adaptive functioning at the time he filed his *Atkins* claim, the focus of the evaluation. Although Hill's malingering during the testing certainly contributed to this lack of evidence, it was the fact that Hill had been on death row for more than seventeen years, according to the experts, that made their evaluation particularly "unusual" and "challenging."[14] (*See, e.g.*, Supp. App., Disc 1, Tr., 647 (Olley test.) ("Our task is an unusual and a challenging one because the standards of our profession [*74] make no explicit statement about how to evaluate a person who has been in prison for a long time.").) *See also* AAMR 2002 Manual, 85 ("Observations made outside the context of community environments typical of the individual's age peers and culture warrant severely reduced weight.").

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[14] Moreover, even if Hill had cooperated with the experts' testing, under AAMR standards, the tests should not have been dispositive anyway, since Hill was being used as his own informant regarding his functioning. The AAMR advises,

> Those who use most current adaptive behavior scales to gather information about typical behavior rely primarily on the recording of information obtained from a third person who is familiar with the individual being assessed. [T]he respondent [should be] a parent, teacher, or direct-service provider rather than from direct observation . . . or from self-report of typical behavior.

AAMR 2002 Manual, 85. The experts and court, therefore, would have had to review evidence from other sources in any event.

Nevertheless, the appellate court found "abundant competent and credible evidence" supporting the trial court's decision that Hill had not met his burden of proving that he possessed [*75] the requisite adaptive deficits to qualify as intellectually disabled. And, despite certain weak evidence and flawed analysis, this Court cannot say that the appellate court's determination was so clearly erroneous or unreasonable as to satisfy AEDPA's exacting standards.

(a) Hill's adaptive functioning during childhood: school and juvenile court records

In summarizing the trial court's findings regarding Hill's adaptive behavior during childhood, the Ohio appellate court stated:

> *Public School Records.* Hill's public school records amply demonstrate a history of academic underachievement and behavioral problems. Hill is often described as a lazy, manipulative, and sometimes violent youth. Although there are references to Hill's being easily led or influenced by others, the trial court noted that much of Hill's serious misconduct, including two rapes committed prior to Fife's murder, occurred when he was acting alone. Hill knew how to write and was described by at least one of his special education teachers as "a bright, perceptive boy with high reasoning ability."

Hill, 177 Ohio App. 3d at 192, 894 N.E.2d at 124.

This characterization of Hill's school and juvenile court records is troubling. [*76] First, the state court cites evidence here that is irrelevant under the

clinical guidelines. It implies that evidence of Hill's weak academic and other adaptive functioning as a child reflects only Hill's indolence and poor behavior, excluding intellectual disability as a cause or at least casting doubt on it. But the AAMR advises that "adaptive behavior refers to typical and actual functioning and not to capacity or maximum functioning." AAIDD User's Guide, 20. "Underachievement," therefore—whatever its cause—is irrelevant to adaptive functioning. Similarly, the AAMR cautions that "adaptive behavior and problem behavior are independent constructs and not opposite poles of a continuum." *Id.* *See also* DSM-IV-TR, 42 ("Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social or vocational opportunities, and the mental disorders and general medical conditions that may coexist with mental retardation."). Therefore, as the experts explained at Hill's hearing, the presence of a conduct disorder or other mental illness does not contradict a diagnosis of intellectual disability; intellectually disabled persons can, and [*77] often do, suffer from mental illness.[15] (*See* Supp. App., Disc 1, Tr., 473 (Hammer test.); 1102 (Huntsman test.); 1537 (Sparrow test.).) *See also Black*, 664 F.3d at 99 ("[M]ental retardation and other mental disorders are not mutually exclusive. . . . Rather, mental retardation and any number of other factors may

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[15] The AAMR states that mental health disorders are "much more prevalent" among intellectually disabled persons than the general population. AAMR 2002 Manual, 172. The DSM-IV-TR states, "Individuals with mental retardation have a prevalence of comorbid mental disorder that is estimated to be three to four times greater than in the general population." DSM-IV-TR, 45.

coexist as comorbid causes of a defendant's deficient adaptive functioning." (internal citations omitted)); *Holladay*, 463 F. Supp. 2d at 1345 ("This court rejects the argument that willful and [] anti-social behavior excludes a mental retardation determination. To the contrary, it suggests that a person whose IQ tests strongly indicate mental retardation has not adapted.").

Furthermore, the court's finding that Hill "underachieved" academically or in any other adaptive skill as a child is squarely contradicted by the [*78] record. This Court could not find one reference in Hill's school records by a teacher, school administrator, psychologist, psychiatrist, or anyone else suggesting that Hill was capable of performing at a substantially higher level but chose not to.[16] And the experts all agreed that there is no evidence in the school records that Hill malingered, or pretended to

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[16] The Court found only one express statement in the record that Hill could have performed better academically than he actually did. A teacher wrote in a "Progress Report" in 1980 that, according to Hill's IQ test results that year, he "should be reading at a mid-second grade level," but had "only demonstrated the ability to read on a first grade level." She speculated, "Possibly this is due to Danny's need for glasses, and his dislike for reading." (Supp. App., Disc 1, 568.) Whatever the cause for Hill's problems in reading that year, a year that he experienced serious difficulties across the board, a seventh grader's failure to read at a second-grade rather than a first-grade level does not qualify as the type of "underachievement" the Ohio court suggests, such that Hill could have read at a significantly higher level but chose not to. Even if Hill had read at a second-grade level when he was thirteen years old, he still would have been seriously impaired.

be slower than he was.[17] (Supp. App., Disc 1, Tr., 272-73 (Hammer test.); 856 (Olley test.); 1110 (Huntsman test.); 1541 (Sparrow test.).) As Dr. Hammer noted, children normally do not wish to be placed in special education programs or to be labeled intellectually disabled because of the stigma attached. (*Id.* at 225-26, 231, 298.) In fact, if Hill's academic or other adaptive limitations could have been attributed to Hill's laziness or deception, as the court suggests, Drs. Hammer and Olley agreed that school psychologists would have reported that fact and Hill would not have been placed in special education programs and programs for intellectually disabled students. Both the social bias and the law at that time favored mainstreaming children in school as much as possible over the risk of stigmatizing them by labeling them intellectually [*79] disabled.[18] (*Id.* at 151, 218, 472 (Hammer test.); 828-34 (Olley test.).)

The Ohio court also discounted the repeated references in the school records to Hill being easily

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[17] Dr. Huntsman did speculate in her report, however, without citing any evidentiary support, that the early formal assessments of Hill's cognitive abilities [*80] were invalid because "Mr. Hill has always been an unmotivated test taker, I think, since there have always been rewards associated with poor performance in the forms of attention and an easier curriculum. He had little academic interest for years . . . ." (Supp. App., Disc 1, 1140.)

[18] In elementary school, Hill was mainstreamed only in gym and music class. (Supp. App., Disc 1, 247-48, 554.) In junior high school, he also was mainstreamed in art and practical arts. (*Id.* at 558.)

led by others[19] with the fact that Hill committed two rapes and other crimes on his own. Evidence of Hill's crimes, however, should be given little, if any, weight in determining his adaptive skills. The AAMR directs, "Do not use past criminal behavior . . . to infer level of adaptive behavior or about having MR/ID . . . . First, there is not enough available information; second, there is a lack of normative information." AAIDD User's Guide, 17-20. Isolated acts of criminal behavior, after all, contradict the essential meaning of adaptive behavior. In *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), the Supreme Court recognized [*81] that a defendant could be intellectually disabled and have sufficient insight and planning ability to deliberately kill a rape victim to avoid detection. Such acts, it found, may exemplify a reduced ability to control one's impulses and evaluate the consequences of one's conduct, rather than undermine a diagnosis of intellectual disability. *Id.* at 322. Numerous other courts also have acknowledged the problematic nature of this evidence. *See, e.g., Brumfield v. Cain*, 854 F. Supp. 2d 366, 395-96 (E.D. La. 2012) ("In assessing the weight to be given to criminal facts, this Court lends great credence to the clinical admonitions that using those facts to determine adaptive skills is at best a haphazard and risky business."); *Holladay*, 463 F.

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[19] The court's acknowledgment that "there are references to Hill's being easily led or influenced by others" is a gross understatement. Psychologists, social workers and teachers almost uniformly commented on this trait, describing Hill, for example, as a "follower," "easily influenced," or "highly suggestible." (*See, e.g.*, Supp. App., Disc 1, 515, 519, 522, 527, 532, 533, 537, 557, 1976.)

Supp. 2d at 1344 n.28 (rejecting argument that ability to commit crime and temporarily avoid capture forecloses a determination of intellectual disability and stating, "The State has repeatedly referred to Petitioner's crimes as 'complicated.' Apparently he came to harm, even kill, his ex-wife and killed all who were present. It was not 'complicated.' It was, perhaps, at least partly impulsive. The Respondent refers to Petitioner's 'criminal acumen.' [*82] He always got caught.").

Finally, this Court is most troubled by the Ohio court's finding that "Hill knew how to write and was described by 'at least' one of his special education teachers as 'a bright, perceptive boy with high reasoning ability.'" As to Hill's writing skills, the Court finds no evidence in the record that Hill could write much more than his name during his school years, and struggled even with that. At eight years old, a school psychologist reported that Hill's motor-visual skills were so poor that he could not copy a diamond. She also noted, "[w]hen Danny printed his name, the reproduction was very poor and he spelled his last name Hlli." (Supp. App., Disc 1, 493.) At thirteen years old, a school psychologist reported Hill's weakness in "reproduc[ing] symbols using phchomotor [*sic*] [*83] speed and coordination" and that his handwriting was "immature for his chronological age." (*Id.* at 522; *see also id.* at 519 ("written expression is weak").) A teacher wrote that year that Hill could write "simple sentences . . . with assistance," but had "a great deal of difficulty thinking of sentences to accompany pictures." (*Id.* at 569.) At fourteen years old, Hill's teacher wrote that one of her goals for Hill was for him to "write [his] own signature." (*Id.* at 578.) One of Hill's counselors

testified at Hill's mitigation hearing that when Hill was fifteen years old he could not read or write. (ECF No. 28, 78.)

In addition, the court's observation that "at least" one teacher found Hill to be "bright" and "perceptive," with "high reasoning ability," is almost cynical in its selective misrepresentation of the facts. *See, e.g., Holladay*, 463 F. Supp. 2d at 1343 ("It is important, in determining whether a person is or is not mentally retarded, not to pick and choose so as to overemphasize certain characteristics."). This Court could not find one other reference to Hill as "bright," "perceptive" or in any way intellectually or academically talented from any educator or anyone else involved [*84] in Hill's education. Indeed, the experts all agreed that Hill's school records indicated significant limitations in functional academics. (*See* Supp. App., Disc 1, Tr., 69, 230 (Hammer test.); 783 (Olley test.); 1112 (Huntsman test.).) Moreover, the comment is belied by the document itself. It was written by a special education teacher at Fairhaven, a school for intellectually disabled children, on an individual educational plan ("IEP") form when Hill was fourteen years old. (Supp. App., Disc 1, 578-79.) The teacher notes that Hill was reading at the first-grade level and doing math at the third-grade level. Among the goals she listed for Hill were: "develop appropriate behavior," such as "work[ing] without being disruptive[,] touch[ing] others in a manner suitable to school[, and] play[ing] cooperatively"; and "develop necessary self help [*sic*] skills," such as "shower[ing] regularly[,] us[ing] deodorant regularly[,] maintain[ing] a clean, neat appearance, mend[ing] torn clothing before wearing in public, eat[ing]/drink[ing] in a manner appropriate to

school." (*Id.* at 578.) The teacher, by calling Hill "bright" and "perceptive," perhaps was attempting to set a positive tone for a student [*85] at a school for intellectually disabled children, but her goals for Hill clearly show that he was struggling to achieve academically and to behave appropriately and productively.

In fact, Hill's school and juvenile court records, which number hundreds of pages, are replete with evidence of Hill's limitations in adaptive functioning. They tell the story of a child who was raised primarily by an intellectually disabled mother, diagnosed as intellectually disabled in kindergarten, and identified and treated as such throughout his childhood. Hill was placed in special education classes for intellectually disabled students from the first grade on. At age thirteen, he was sent to a school for intellectually disabled children, and was transferred to another, similar school at fifteen because of poor academic achievement and behavior. At seventeen years old, after being arrested for, and pleading guilty to, two felony rape charges, the juvenile court placed Hill in a facility that housed mentally ill youth offenders.

Hill was born on January 6, 1967, in Warren, Ohio, to 18-year-old Vera Hill.[20] (*Id.* at 1973.) Hill's mother was intellectually disabled (*id.* at 515, 522, 527; ECF No. 31, 256-57), [*86] had attended school only through the eighth grade (ECF No. 31, 8), and lived primarily on public assistance while Hill was a child (*id.* at 9). Hill had no contact with his father.

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[20] Hill was Vera's maiden name. She later assumed the surnames of two husbands, Vaugn and Williams.

(*Id.* at 9-10.) He lived with his mother and three brothers, each from different fathers. He was second oldest. (*Id.* at 7.) Hill also lived for several years with a stepfather, Charles Williams, and for a period of time with three of Mr. Williams' children, until Mr. Williams died in 1985.[21] (*Id.* at 10-11.) Mr. Williams was kind to the children, but he abused alcohol and worked long hours, so he was not actively involved in parenting. (*Id.* at 12-13, 256.) Hill's mother testified that all four of her sons were "slow" in school, and they all had records of behavioral problems. (*Id.* at 12, 257-58.) She also testified that Hill was well-behaved at home, but he had few friends and stayed home most of the time. (*Id.* at 18-20.)

Hill entered kindergarten [*87] in the Warren City Schools in the fall of 1972, at the age of five. That spring, the school psychologist, Karen Weiselberg, evaluated Hill at the request of his kindergarten teacher, who was concerned about Hill's "present level of intellectual functioning," as he "appear[ed] to be very immature in comparison to the other students." (Supp. App., Disc 1, 489.) Dr. Weiselberg wrote that Hill's IQ score was 70, placing him in the third percentile of the general population. (*Id.* at 490.) He did not know his correct age (he thought he was nine) or his address, and his classmates "often pick[ed] on him." (*Id.* at 489.) He could not count dots, read numbers, or show a certain number of fingers when asked. And he could not match most letters of the alphabet. Dr. Weiselberg concluded that he possessed the visual-motor

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[21] Hill's mother's previous marriage, to James Vaugn, ended in divorce, and it is unclear from her testimony whether Mr. Vaugn ever lived with her and her children. (*Id.* at 11.)

coordination of a three-year-old and, overall, was functioning at the level of a four-year-old. (*Id.* at 490.) She recommended to the principal that Hill be placed in special education classes for "educable mentally retarded" ("EMR") children. (*Id.*)

Dr. Weiselberg tested Hill again at the beginning of third grade, in September of 1975; he was eight years and eight months old at the [*88] time. (*Id.* at 492-94.) She reported that Hill's IQ was 62, placing him within the first percentile of the general population. (*Id.* at 492.) His basic skills in reading, spelling and arithmetic ranged from mid-kindergarten to beginning first-grade level. For example, on a sight recognition word test, Hill could not read any words, and on the arithmetic subtest, he could not read double digit numbers or complete any simple addition or subtraction problems. (*Id.* at 493.) She advised that Hill "will be limited in his ability to generalize, to transfer learning from one situation to another, to do abstract reasoning or to do much self evaluation." Dr. Weiselberg again diagnosed Hill as falling within the EMR classification, and found his functioning at the level of a five-year-old. (*Id.*)

In November of 1977, Hill again was placed in a special education class for fifth grade. (*Id.* at 554-55.) His goals for the year included "us[ing] the short a and short I vowel sounds to sound out words," and "[g]iven multiple choice, [to] be able to choose the main idea of the story." (*Id.* at 554.) The following year, in sixth grade, Hill was "introduced to addition . . . ." (*Id.* at 561.)

In 1980, when Hill [*89] was thirteen years old and in seventh grade, he again was evaluated by a

school psychologist, Annette Campbell, because he was "unable to achieve academically and [had] been having behavioral problems in the school." (*Id.* at 520.) Hill had an F in his special-education classroom work. (*Id.*) His IQ score was 49. (*Id.* at 521.) Dr. Campbell reported that Hill did not know his address or phone number, and that she observed during the testing behaviors such as "an immature pencil grip, making noises, being restless and tired, rolling his eyes back into his head, making faces when he talks, [and] working with his pencil hanging straight out of his mouth." (*Id.* at 520.) But she stated that he "did cooperate and accepted all tasks presented to him." (*Id.*) Dr. Campbell diagnosed Hill as intellectually disabled, finding weaknesses in "not being able to recall everyday information, do abstract thinking, perform mental arithmetic, perceive a total social situation, perceive patterns, and to reproduce symbols using phychomotor [*sic*] speed and coordination." (*Id.* at 522.) She also reported that Hill exhibited "a great deal of impulsivity." She explained,

> This means Danny does not think before he [*90] acts or speaks. Giving few responses is typical of mentally retarded children. He seems to feel tension and anxiety in trying to handle his environment. The school environment is extremely frustrating to Danny. Basically, testing shows that he is an affectionate child, not overtly aggressive. The fighting he has been in in school is usually cases where he is led into it by others.

(*Id.*) She concluded, "Danny is a child who is not functioning academically in his present placement.

He also is extremely immature and is easily led by others into trouble around school." (*Id.*) Dr. Campbell recommended that Hill be placed in the smaller, more confined "Behavioral Improvement" unit where he would receive more individualized help "both academically and socially." And if that did not work, she recommended he be placed in the Fairhaven Program in Niles, Ohio, for the trainable mentally retarded ("TMR"). She also recommended a neurological examination to "help to explain the continuous drop in I.Q. points." (*Id.*)

Dr. Campbell repeated Hill's testing less than four months later. This time, Hill's IQ was 48. (*Id.* at 513.) She now recommended placement in the Fairhaven Program. (*Id.* at 515.) Hill's [*91] academic and social functioning continued to deteriorate that year. One of his teachers wrote that his "academic ability seems to be at a first grade level, as do his social skills." (*Id.* at 568.) She explained,

> Danny usually is very sleepy and has fallen asleep in class. He is always unprepared for class (without paper and pencil), and when these are provided for him, he usually looses [*sic*] them between classes. Often Danny wanders through the halls and for this reason is late for classes.
>
> Danny is unable to complete his lessons, which are on a first grade level, without assistance. If Danny is left unattended, he strays from his task and begins to display immature behaviors, or falls asleep. These behaviors include making noises, throwing small objects, verbally antagonizing others, taking things

> that do not belong to him, and wandering around the class room.
>
> . . .
>
> Danny is a very affectionate child. He often expresses the desire to be hugged and will often rest his head on the teachers [*sic*] shoulder. On occassion [*sic*], Danny has kissed the teacher indicating a desire to receive attention.

(*Id.*) Hill was just beginning to learn subtraction and had "a great deal of difficulty subtracting [*92] with numbers larger than 10." (*Id.*) That May, Dr. Campbell completed a psychological evaluation form for the County Board of Mental Retardation to request Hill's placement at Fairhaven School. (*Id.* at 516-19.) She listed his "developmental disability areas" as "communication and self-help general." (*Id.* at 516.) Her "special instructional recommendations" were: "1. Teach address and phone number. 2. Teach functional words in reading. 3. Teach telling time." (*Id.*) Regarding Hill's academic skills, she wrote: "First and second grade levels academically, extremely immature and dependent, responds like a five year old . . . needs constant supervision." (*Id.* at 519.) Regarding his adaptive behavior, she wrote: "He is weak in communication and self-help general. Observations show weaknesses in socialization and fine-motor skills." (*Id.*)

Hill attended the Fairhaven Program for the 1980/81 and 1981/82 school years, but he continued to struggle academically and socially. Hill's mother testified at his mitigation hearing that the Fairhaven students teased Hill, "call[ing] him dumb and stuff like that," and Hill often skipped school because of

that. (ECF No. 31, 15.) His reading skills remained [*93] at the first-grade level, and his math skills advanced only to the third-grade level. (*Id.* at 575, 578.) The program also continued to work with him on self-help skills, such as personal hygiene, and social skills, such as controlling his temper and respecting authority. (*Id.*) In April 1982, Dr. Campbell again evaluated Hill. (*Id.* at 511-12.) His IQ score was 63. (*Id.* at 511.) Her testing indicated a social maturity of a twelve-year-old, with "much impulsivity" and "much hostility and aggression." (*Id.*) She further noted that Hill "seem[ed] to feel insecure, immature, and inadequate needing much emotional support," had "severe problems" at school that year, and exhibited "weaknesses in the areas of communications, self-direction, socialization and occupation." (*Id.* at 511-12.)

At this time, Hill began to get into trouble with the police, mainly for theft-related crimes and truancy. In August 1982, the court placed him in a group home in a rural, farm setting operated by Brinkhaven Enterprises, Inc. ("Brinkhaven"), in North Lawrence, Ohio. (*Id.* at 526.) Hill did well there. (*Id.* at 524, 1973.) In January of 1983, Brinkhaven's court liaison officer wrote of Hill, "Dan is improving in [*94] his personal hygiene. While he needs constant reminder[s] to shower, brush his teeth, etc., he does attempt to do a [more] thorough job than when he first came to the program." He also noted that "Dan receives tutoring in basic skills, as well as requiring a lot of one-on-one teaching within the classroom itself." (*Id.* at 524.) His tutor at Brinkhaven reported that Hill worked at the first-grade level in reading and the second-grade level in math. (*Id.* at 525.) Mark Brink, one of Hill's youth

workers, and later the vice president and court liaison officer at Brinkhaven, testified at Hill's mitigation hearing that Hill needed twenty-four hour supervision, because:

> everything you wanted Danny to do, you explained it to him. If you wanted him—you know, you had to tell him every day: "Danny, comb your hair, brush your teeth, take a shower." Chores, you had to follow up to make sure they're done properly. You needed to supervise him while he was doing them a lot of times.

(ECF No. 31, 87.) He also commented that Hill often was teased for being heavy and "one of the slower kids that we had there," and was a follower. (*Id.* at 84-86.) Hill left Brinkhaven in February of 1983 because of a lack [*95] of funds at the county level. (*Id.* at 83; Supp. App., Disc 1, 526.) He enrolled in the tenth grade at Warren Western Reserve High School. (Supp. App., Disc 1, 1973.)

Hill rarely attended school, however, and continued to get into trouble. By December 1983, Hill had amassed four felony and eight misdemeanor juvenile convictions, all related to theft. (*Id.* at 1936-38, 1947-69.) Hill told a Department of Youth Services employee that he did not attend school because students there repeatedly threatened to hurt him. (*Id.* at 532.) His mother told the same employee that she blamed Hill's troubles on three boys and "some adults" who threatened him and "got Danny to steal for them. What they told him he would do." (*Id.*) Hill was expelled from school for the remainder of the year in February 1984. Neither Hill nor his

mother attended the expulsion hearing. (*Id.* at 618, 1973.)

In January 1984, the juvenile court asked psychologist Douglas Darnall to evaluate Hill for a bind over proceeding. Dr. Darnall reported to the court that Hill fell in the "mildly retarded range." (*Id.* at 527.) His IQ was 55. (*Id.*) Dr. Darnall discounted the adaptive skills test because Hill's mother served as the informant, [*96] and wrote, "it is reasonable to conclude that Danny's overall functioning is within the mildly retarded range." He opined that Hill's level of adaptive functioning was "[v]ery [p]oor." He explained, "His judgement [*sic*] is poor and he does not think of consequences. He is highly suggestible." He also stated, "Danny does not comprehend the seriousness of his offenses." (*Id.*) Dr. Darnall did not recommend bind over to an adult facility. He felt Hill would not benefit from rehabilitation in an adult facility and was "likely to be exploited" because of his "passivity and limited intellectual ability." (*Id.* at 528.) Although Dr. Darnall considered Hill's prognosis "poor regardless of where [Hill was] placed," he recommended that if convicted, Hill "be placed in a juvenile facility that is highly structured and can provide programming for mentally retarded youth." (*Id.*) He "further anticipate[d] that Danny will in time need to live in an adult halfway house which would be able to provide both social as well as vocational habilitation." (*Id.*) The Probation Department agreed with Dr. Darnell and recommended that Hill be returned to Brinkhaven, where he would get the "intensive, individual [*97] attention" he needed, rather than an adult facility, where "he would only be exploited by older, more hardened criminals." (*Id.*

at 529.) The bind over was denied on March 5, 1984, and Hill was again committed to Brinkhaven. (*Id.* at 1952.)

Three days later, however, Hill was back in court, this time charged with two counts of rape. (*Id.* at 1923, 1936, 1975.) He pleaded guilty to both counts and was sentenced to serve a minimum of one year and a maximum period not to exceed Hill's twenty-first birth date at the Training Center for Youth ("TCY"), a secure facility for youth offenders with psychological problems. (*Id.* at 531, 1939.) On April 25, 1984, Hill was evaluated by the head psychologist at TCY, R.W. Jackson. (*Id.* at 530.) Hill's IQ was 65. (*Id.*) Dr. Jackson wrote that Hill was an "[i]ntellectually limited, socially constricted youth with very few interpersonal coping skills. Rather immature and self-centered with needs for attention and approval of others." (*Id.*) A TCY social worker stated in a treatment plan that Hill was "a very limited, mildly retarded youth who has no insight into the seriousness of his delinquent activities. He shows no remorse for his victims nor . . . shame [*98] . . . ." (*Id.* at 1975-76.) She further stated that Hill was "very easily influenced or intimidated by more mature and aggressive youths," and "appear[ed] to be becoming a very dangerous youth if not rehabilitated or given the proper amount of structure, supervision, and guidance." (*Id.* at 1976.)

TCY employees testified at Hill's mitigation hearing that the older boys frequently beat Hill, so he was moved to a smaller unit with younger, less "hostile" boys. (ECF No. 31, 100, 122, 150, 166-67.) They all agreed that Hill was a "loner" and a "follower" while there. (*Id.* at 105, 122, 124, 147, 151,

166.) One youth worker testified that "with [Hill] being so limited," he would often forget her instructions. She added, "And so, when you tell Danny to do something, then you would have to follow him through that. You just couldn't say, 'Well, Danny, I want you to go and mop the bathroom,' because he wouldn't do it." (*Id.* at 172-73.)

Hill completed the ninth grade in special education classes while at TCY in January 1985, at age eighteen. (*Id.* at 533.) He was released from TCY that March, and returned to high school in Warren.[22]

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[22] The record relating to Hill's release from TCY is chilling. An employee of the Ohio Department of Youth Services wrote in an admission report when Hill entered TCY,

> Because of his limited ability to control his behavior and [because he] follows the dictates of those with whom he chooses to associate[,] Danny's prognosis would appear to be quite guarded. In a well-structured program, Danny could no doubt function quite well. The area to which he will return is not at all conducive to his making a positive adjustment. No doubt the community would have some very strong reactions to his return because of the nature of his offenses. Yet in view of the fact that he will be 18 years of age at the time his sentence terminates, and the mother wants him home, placement will be made with her.

(Supp. App., Disc 1, 532.) And Cheryl West, Hill's youth leader at TCY, testified at Hill's mitigation hearing that when Hill was released,

> he wasn't ready to leave. I brought it to quite a few people's attention. One in particular [*100] was Mrs. Ann Swilger. At the time, she was the deputy superintendent. And I brought it to her attention that Danny was not ready to be released. And Danny was standing there with me, and Danny said, "I would prefer to go to a group home until I get myself together. And now you're going to send me home, and if I go back

(*Id.* at 537.) The goal was for him to "stay away from negative peers" [*99] because he "continues to be a follower," and enroll in vocational training and attend community counseling after completing high school. (*Id.*) Fife's murder occurred six months later.

(b) Hill's adaptive functioning at the time of the offense: police and court records

The state appellate court summarized the trial court's findings concerning Hill's adaptive skills at the time of the offense as follows:

> *Hill's Trial for the Murder of Raymond Fife.* The trial court observed that the record of Hill's murder trial provided evidence of Hill's ability concerning self-direction and self-preservation. In particular, the court noted Hill's initiative in coming to the police in order to misdirect the focus of the investigation by implicating others and Hill's ability to adapt his alibi to changing circumstances in the course of [*101] police interrogation. This last point was also noted by Dr. Olley in his hearing testimony: Hill "stood his ground during that interrogation very, very strongly. * * * He not only modified his story a little bit when he was faced with evidence that couldn't possibly have avoided. * * * That to me is a kind of thinking and planning and integrating complex information that is a higher level

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home, I'm going to get in more trouble." Mrs. Swilger at that time said, "Danny, you're a hopeless case. We're going to release you as a hopeless case. Hopefully, you'll get in more trouble and you'll just do more time."

(ECF No. 31, 173.)

> than I have seen people with mental retardation able to do."

Hill, 177 Ohio App. 3d at 192, 894 N.E.2d at 124.

This Court also questions these findings. "Self-preservation" is not among the adaptive skills measured under the clinical definitions of intellectual disability. (*See supra* Section V.A.3.b.) And neither is it clear that this evidence demonstrates a strength in "self-direction" under the clinical guidelines, which define "self-direction" as more than a volitional act of selfinterest. The AAMR defines it as:

> skills related to making choices; learning and following a schedule; initiating activities appropriate to the setting, conditions, schedule, and personal interests; completing necessary or required tasks; seeking assistance when needed; resolving problems confronted in familiar and novel [*102] situations; and demonstrating appropriate assertiveness and self-advocacy skills.

AAMR 1992 Manual, 40. Hill's decision to go to the police voluntarily two days after committing a murder to try to collect a reward for information about the crime is not an example of "appropriate assertiveness and self-advocacy," or an activity "appropriate to the setting" or his "personal interests"; nor is lying about, or blaming others for, your own transgressions to avoid getting into trouble—a classic tactic employed by even the youngest of children.

In fact, one could argue that Hill's actions were quite the opposite of adaptive. Instead of helping to

"resolve his problems," Hill's choices consistently worked against him. Going to the police with information about the murder succeeded only in immediately drawing the police's attention to himself. Sgt. Steinbeck testified at Hill's trial that it was only after Hill showed up at the police station and told Sgt. Stewart details about the murder that most people did not know, that the police began to "pursue" Hill as a suspect. (ECF No. 24, 285-86, 301.) And Hill's confused and outlandish stories about other suspects made him appear even more guilty. [*103] For example, when Hill first went to the police, he told Sgt. Stewart that he saw a boy named Maurice Lowery riding Fife's bicycle. When Sgt. Stewart asked him if Lowery still had the bicycle, he said Lowery "might have put it back in the woods by now." Then a bit later in their conversation, Hill added that he had seen Lowery and another boy from his apartment window at one o'clock in the morning "coming through the field," even though it was dark and that area was at least a mile away. (ECF No. 25, 504-08.) Similarly, Hill readily lead the police to his accomplice, Tim Combs. When Sgt. Stewart asked Hill if he knew Tim Combs, Hill replied that he knew him and he also might have assaulted Fife, since "'[h]e likes to do that to white boys, too.'" Hill then literally lead Sgt. Stewart right to Combs' door. (*Id.* at 509-11.)

After carefully reviewing the transcript of Hill's final statement to police and the trial testimony of the police officers involved, the Court finds that during the police interrogations, Hill did in fact stand his ground, but otherwise, his performance was childlike, confused, often irrational, and primarily self-defeating. Hill's second interrogation

took place [*104] the day after he voluntarily went to the police. This time, Sgt. Steinbeck went to Hill's house and Hill agreed to accompany him back to the station for further questioning. (ECF No. 24, 204.) During the three-hour interrogation, Hill repeatedly changed his story, but not in a way that skillfully hid his part in the crime. Sgt. Steinbeck testified at Hill's trial,

> He contradicted himself so many times; told me so many different stories, that it took that long to find out exactly what was going on. . . . Well, I said that he told me he saw different people at different time, places. Even his own whereabouts he was confused. I felt he was keeping something from me about where he was and what he did in those time periods of those different days.

(*Id.* at 250.) Hill also agreed to go to the police station with Sgt. Steinbeck and Det. Hill, his uncle, for his third and final interrogation, at which he confessed to being at the scene of the crime after an hour and a half of questioning and gave a recorded statement without counsel present. Again, Hill's stories were confusing and contradictory. Sgt. Steinbeck testified,

> We're talking about the same things we did Friday, telling him we believe [*105] he's lying to us. There's too many inconsistencies in his story. "We believe you know more than you're telling us. We think you're involved or know about what took place Tuesday behind the Valu-King."

(*Id.* at 271-72.)

Hill also often changed or embellished his statement at the slightest suggestion by the police, even when the information at issue was irrelevant or incriminating. At trial, Sgt. Stewart recalled saying to Hill, "'Everytime [*sic*] we suggest something to you, you have a tendency to agree with us.'" (ECF No. 26, 646.) During Hill's statement, for example, Hill first said that Fife's shorts were gray. (Supp. App., Disc 1, 2459.) Later, Sgt. Stewart asked him, "Now when he pulled his shorts off, they were blue shorts, they were yellow." Hill replied, "They were yellow." Sgt. Stewart asked, "The shorts were yellow, are you sure?" Hill answered, "Yea, because they looked like Reserve color like . . . gym shorts." When the police told Hill he had previously said the shorts were gray, Hill then claimed he did not know the color of the shorts at all; he saw only Fife's underwear. (*Id.* at 2473-74.)[23] While making his statement to the police, Hill more often seemed to be making things [*106] up as he went along to conform

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[23] Other examples of Hill's extemporaneous changes to his story at the suggestion of the police officers include telling the police: first Combs threw all the physical evidence "in the field," then Combs took the can of lighter fluid with him out of the field (*id.* at 2501-02); first they left Fife on his stomach, then Hill turned Fife over on his back to see if he was breathing (by checking his neck), then he turned him over twice, putting him back onto his stomach again to help him (*id.* at 2466-67, 2510-11); first he saw Combs twice since Combs was released from the penitentiary, then only once (*id.* at 2479); alternating between Combs throwing Fife's bicycle into the bushes and placing it in the bushes (*id.* at 2463, 2467-68, 2503); first Combs threw his cigarette lighter into the bushes and came back later to find it, then he kept it with him, then he left it at the scene and used matches to light a cigarette after the murder (*id.* at 2503).

to the police's questions and expectations than adroitly hiding information or planting false information to protect himself.

Indeed, although he never admitted to harming Fife, Hill often changed his story during the [*107] interrogations and his statement in a way that only further incriminated himself. The best example of this is that after admitting to police that he was at the scene of the crime, his proximity to, and involvement in, the assault increased with each account. His descriptions of the events did not always flow logically, and they often contained language that is difficult to decipher, but a summary of Hill's different versions of how the murder occurred is as follows:

At first, Hill told police that after he and Combs had a general conversation near the Valu King store, he saw Combs walk into the woods. He did not follow Combs, but a short time later hid behind some bushes in the woods and watched Combs murder Fife from a distance. Combs didn't say anything to Hill; he ran away when he noticed Hill watching him. Hill said he also ran away after Combs left to get lighter fluid from the back of the store, returned, and Hill saw "some smoke." (*Id.* at 2457-60, 2462.) In his next account, Hill saw Combs grab Fife off his bicycle from a hill that overlooked the field. He then went to the Valu King parking lot and grabbed a board to hit Combs and get him off Fife. He walked up to Combs and Fife, [*108] but Combs told him to get back up the hill or he would blame him for the crime. (*Id.* at 2469-71.) In Hill's final account, he told the officers that he ran into Combs a short distance from Valu King, and he and Combs walked to the back of Valu

King together. There, they saw Fife coming up the path through the woods on his bicycle, and Combs told Hill he wanted to steal Fife's bike. Combs asked Hill to help him, but Hill refused. Hill then followed Combs into the woods.[24] (*Id.* at 2480-83.) Hill said he was just about ten feet away from Combs during the assault, but did nothing to stop it. (*Id.* at 2485-86, 2490.) He remained there even when Combs left to get the lighter fluid. (*Id.* at 2492.) Hill told police that when Combs returned, however, he was back up the hill. He said he "had looked down there [Combs] had already seen me and [Hill] said now look what you done." (*Id.*) And when Combs lit the "cloth," he "had came down there" and "was trying to sneak up on him and hit him with the board." (*Id.* at 2492-93.) Combs told him to get back up the hill, and Hill says he took the board back behind the store. (*Id.* at 2943.) He then followed Combs out of the field. (*Id.* at 2499.)

Finally, far from being "planned" and "complex," many of the stories Hill concocted for the police appeared spontaneous, and were completely

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[24] At this point [*109] Hill's story gets confused and convoluted in a way that was typical of Hill during his statement. Hill first said, "So then I seen him go back there in the path way so I started coming around and around about that time that's when I seen him knock the boy off the bike." (*Id.* at 2481.) When asked to clarify, he said he did not follow Combs but "walked to the other side. Like there is this side street that you can go down." And then, because he "kn[ew] how Tim Coomb's [*sic*] is," he "circled back" to where Combs was with Fife, and Combs "had the little boy on the ground." When asked, "Did you see him knock him off the bike?" Hill responded, "He had him in a headlock." (*Id.* at 2482-83.) Later, Hill said he did see Combs knock Fife off his bike. (*Id.* at 2488.)

unbelievable. This exchange demonstrates the confused, ad hoc nature of Hill's statement:

> Sgt. Steinbeck: . . . [D]id Tim Combs walk with the gray shorts?
>
> Danny: Yea. Yea he had them up under his own shirt, he had them up under his shirt and the next day, and I seen him the next day, he was hurrying [*110] right back there and then that's when he was looking, he had threw, he had pinned the bike up under some weeds like and threw them shorts up under there.
>
> Sgt. Steinbeck: So you say Tim Combs come back to the field the very next day carrying the boy's shorts and he hid the shorts and he hid the bike. Yes?
>
> Danny: Yes.
>
> Sgt. Steinbeck: Have you talked to Tim Combs about this after, since it happened?
>
> Sgt. Stewart: Not at all?
>
> Danny: I ain't even seen him.
>
> Sgt. Steinbeck: Danny, you said the next day you saw him bring the shorts back, how did it happen that you and him would be at the same place, at the same time the very next day?
>
> Danny: Because he came past the house and like where my house is at you can, you know, look right down there by the field when the door is open, so you saw him go past the door.
>
> Sgt. Steinbeck: You saw him walking past.
>
> Danny: Past my door.

> Sgt. Steinbeck: So you walked with him?
>
> Danny: No I waited until he went down the hill and I circled, I took this other path when he came down and walked down towards there he was going across the street. Around about the time he went down across the street towards that pathway where that little boy was laying, I was coming straight [*111] down there and I turned up in Valu King building and that's when I seen him stick the bike up in some bushes and he threw those shorts up on top of the bike.
>
> Det. Hill: That ain't true now, you got to find exactly what he did with those shorts?
>
> Sgt. Steinbeck: That ain't true man.

(*Id.* at 2467-68.) Hill also claimed that the attack occurred over two hours (*id.* at 2496), and that garbage men may have removed some evidence left in the woods (*id.* at 2521).

Perhaps most troubling, and also in contravention of the clinical guidelines, the Ohio court emphasized Hill's strength in the one area of "self-direction" while ignoring the significant evidence from the time of the crime demonstrating Hill's adaptive deficits. The Ohio Supreme Court has recognized that an overriding consideration in assessing adaptive skills is that "one must focus on those adaptive skills the person lacks, not on those he possesses." *State v. White*, 118 Ohio St. 3d 12, 22, 2008 Ohio 1623, 885 N.E.2d 905, 914 (Ohio 2008). *See also Black v. Bell*, 664 F.3d 81, 99 (6th Cir. 2011) ("[A] court reviewing whether a defendant is mentally retarded 'must focus on Defendant's deficits, not his abilities.'"

(quoting *United States v. Lewis*, No. 1:08-CR-404, 2010 U.S. Dist. LEXIS 138375, 2010 WL 5418901, at *30 (N.D. Ohio Dec. 23, 2010))); [*112] *Sasser v. Hobbs*, 735 F.3d 833, 848 (8th Cir. 2013) (the adaptive skills prong of the clinical intellectual disability definition "does not involve balancing strengths against limitations. It simply requires deciding whether the evidence establishes significant limitations in two of the listed skill areas."). The AAMR stresses that "[w]ithin any individual, limitations often coexist with strengths," an assumption "essential to the application" of the intellectual disability definition. AAMR 1992 Manual, 1. It explains,

> This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.

Id. at 8-9. "Thus, in the process of diagnosing [intellectual disability], significant limitations in conceptual, social, [*113] or practical adaptive skills is not outweighed by the potential strengths in some adaptive skills." *Id.* at 47. For example, some mildly intellectually disabled persons can read up to the fifth-grade level (Supp. App., Disc 1, Tr., 1783 (testimony of J. Gregory Olley, Ph.D. (hereinafter,

"Olley test.")), hold a job with limited responsibilities (*id.* at 871 (Olley test.)), play cards (*id.* at 1136 (testimony of Nancy J. Huntsman, Ph.D. (hereinafter, "Huntsman test."))), or obtain a driver's license (*id.* at 375 (testimony of David Hammer, Ph.D. (hereinafter, "Hammer test.")).

This assumption arises from the concern that if evaluators accord dispositive weight to perceived strengths, rather than focusing on actual limitations, their findings will "reflect the stereotypical view [of] mentally retarded individuals [as] utterly incapable of caring for themselves." P. White, *Treated Differently in Life But Not in Death: The Execution of the Intellectually Disabled After Atkins v. Virginia*, 76 Tenn. L. Rev. 685, 703 (2009) (internal citations and quotation marks omitted). As Dr. Hammer testified, "When most people think of mental retardation they tend to think more of the moderate, severe and [*114] profound," (Supp. App., Disc 1, Tr., 185), but persons with mild intellectual disability "are not very obvious" (*id.* at 188). Dr. Sparrow explained it this way:

> I think one of the fallacies . . . in the general public is that you can tell by talking to somebody or looking at them that they have mental retardation and you cannot. In mild mental retardation often you cannot tell by talking to somebody or looking at somebody that they have mild mental retardation. That's why we have to have tests.

(*Id.* at 1627.)

Indeed, three psychologists testified at Hill's mitigation hearing that Hill was intellectually disabled at that time and had extremely poor

adaptive functioning. (ECF No. 31, 194-96 (Dr. Darnell opining that Hill's adaptive functioning was "very poor"); 263-66, 278-79, 283 (Dr. Schmidtgoessling testifying to Hill's "incapability of managing life more effectively"); 303, 336 (Dr. Crush finding "severe impairment," including functioning).) Significantly, although they rejected his claims based upon his mental status, the Ohio Supreme Court and Eleventh District Court of Appeals found these psychologists' testimony credible and concluded that Hill was intellectually disabled. *See Hill*, 64 Ohio St. 3d at 335, 595 N.E.2d at 901 [*115] ("[W]e find that [Hill's] mental retardation is a possible mitigating factor."); *Hill*, 1989 Ohio App. LEXIS 4462, 1989 WL 142761, at **6, 32 (Hill "admittedly suffers from some mental retardation . . . ."; "The record is replete with competent, credible evidence which states that [Hill] has a diminished mental capacity. He is essentially illiterate, displays poor word and concept recognition and, allegedly, has deficient motor skills. [Hill] is characterized as being mildly to moderately retarded. There is some suggestion that [Hill's] "mental age" is that of a seven to nine year old boy.").

The psychologists noted Hill's adaptive deficits particularly in functional academics and social skills. As discussed above, Hill's school and juvenile court records from the time period shortly before his arrest reflect his significant limitations in academic functioning. Moreover, there was considerable testimony at both the suppression hearing and the mitigation hearing that Hill could not read and could only write his name. Hill himself testified at the suppression hearing that he could not read and could write only his name. (ECF No. 29, 358-59.) Dr. Schmidtgoessling testified at that hearing that Hill

could not read [*116] and still did not consistently spell his name correctly. (*Id.* at 482, 507.) Dr. Crush also testified at the mitigation hearing that Hill was "illiterate." (ECF No. 31, 308.) Mark Brink, the vice president of Brinkhaven, testified at the mitigation hearing that Hill could not read or write while he was at the institution and needed special, individual tutoring. (*Id.* at 78.) In addition, shortly after Hill's trial, the prison psychiatrist and social workers were concerned about Hill's "illiteracy" and resulting difficulties. Similarly, the social program specialist at Hill's prison wrote to the director of the Education Department a year after Hill was convicted that Hill was "illiterate" and needed "remedial action." (Supp. App., Disc 1, 1512.)

The psychologists also testified about Hill's lack of social skills. Dr. Darnall spoke of Hill's poor self-esteem, inability to interpret social situations and create positive relationships, and that he was easily influenced by people, gravitated toward an antisocial peer group, and did not respond appropriately to authority figures. (ECF No. 31, 189-90, 192, 197-98.) Dr. Schmidtgoessling explained that Hill

> doesn't realize the impact that he has [*117] on other people. I think because he's not reflective, because he can't examine his own life, because he really can't appreciate how other people feel, yeah, if he had those feelings, then it would — it would inhibit. That's what we mean by a lack of internal controls.

(*Id.* at 281.)

(c) Hill's adaptive functioning at the time he filed his *Atkins* claim: prison records and statements to reporter and court

The Ohio court of appeals next discussed the trial court's findings regarding Hill's mental status near the time he filed his *Atkins* claim in January 2003, when Hill was 36 years old and had been on death row for seventeen years. It stated:

> *Death Row Records.* At the time of the evidentiary hearing, Hill had been incarcerated on death row for 20 years. From this period of time, the trial court considered audiotaped interviews of Hill by Warren's Tribune Chronicle reporter Andrew Gray in the year 2000. These interviews were arranged on Hill's initiative in order to generate publicity for his case. The trial court found Hill's performance on these tapes demonstrated a high level of functional ability with respect to Hill's use of language and vocabulary, understanding of legal processes, ability [*118] to read and write, and ability to reason independently.
>
> The trial court considered the evidence of the various prison officials who testified at the evidentiary hearing. These witnesses consistently testified that Hill was an "average" prisoner with respect to his abilities in comparison with other death row inmates. They testified that Hill interacted with the other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules. Prison officials offered further testimony in

> their interviews with the expert psychologists. One official opined that Hill began to behave differently after *Atkins* was decided, and he believed that Hill was "playing a game" to make others think he is retarded. Another official reported that Hill's self-care was "poor but not terrible" and that Hill had to be reminded sometimes about his hygiene.
>
> *Hill's Appearances in Court.* The trial court stated that it had "many opportunities" to observe Hill over an extended period of time and, as a lay observer, did not perceive anything about Hill's conduct or demeanor suggesting that he suffers from mental retardation.

Hill, 177 Ohio App. 3d at 192-93, 894 N.E.2d at 124-25.

(I) [*119] Hill statements and reading

The Court finds, after reviewing Hill's taped interviews with Gray, that Hill did indeed demonstrate certain verbal skills, and he clearly read with a certain speed, accuracy and emphasis. (*See* Supp. App., Disc. 5.) Hill's statements in court displayed similar strengths. This excerpt from the transcript of a pre-trial hearing held on April 15, 2004, illustrates Hill's assertiveness and composure, as well as his articulateness, measured by the fluidity of his prose, the organization of his story, the sophistication of the vocabulary, the complexity of his sentence structure, and the level of detail. Hill stated to the Judge:

> I'm gonna tell you exactly what happened, Your Honor. Dennis Watkins used to come

over to my aunt's house, which is my Uncle Morris Hill's wife. Her name is Q.T. Hill. My uncle had a patio that was built onto the back of the house. I guess the police department or whoever allowed him to store evidence in the back of this patio. Every weekend, either Saturday or Sunday, it would either be Dennis Watkins, Peter Kontos or James Teeples that would come and inventory the stuff that was inside of this patio. Morma [*sic*] Fife's son, me, Timothy [*120] Combs and his brother broke into my aunt's house. We went in through the patio area of the house. We took money, drugs and guns from out of the boxes that was inside of the patio. A week or two later, Morma [*sic*] Fife's son came to me. He was supposed to give me some bullets for the guns that he helped us put together. He told me that some police officers came to him, asked him about the break-in of my aunt's house. He told me that they used a night stick on him and told me, "Well, you're gonna need these. You're gonna need these bullets."

Later on, I found out that he hung himself in the basement of her house and that her husband was accused of assaultin' him. When I told this to Maridee Costanzo, she told me that she had heard a lot of rumors circulating around about my case and that one of those rumors was about Morma [*sic*] Fife's son. I never thought that the affidavit that I gave Maridee Costanzo said everything in there. I told her to give it to the FBI so that the FBI could see it. My uncle, from what I know about, was placed up under investigation for

> money laundering. He was suspected as being involved in organized crime, which led to him being demoted from a police narcotics [*121] officer to a traffic cop. And I guess now he's an investigator for their office, the Public Defender's Office. Maridee, as Greg Meyers know, sat there and told him that she knew these people and that she remembered these different things. And she said that she was going to file an actual innocence claim in my case because of it. All I know was that the reason why they tricked me to sign that waiver was so that Greg Meyers could come on to be my attorney. . . . And when I told my attorney, my federal attorney what happened, this is what he said, the papers here. Would you give this to him?

(Supp. App., Disc 1, Tr. 59-61.)

Nevertheless, the Court again is troubled by some of the state court's conclusions regarding this evidence. First, the court once more improperly focuses on an apparent adaptive strength of Hill's rather than analyzing his limitations as required. As noted above, intellectually disabled individuals can read up to a fifth-grade level. Furthermore, the AAMR admonishes, "Do not use . . . verbal behavior to infer level of adaptive behavior or about having [intellectual disability]." AAIDD User's Guide, 22. As Dr. Sparrow testified, the size or sophistication of a person's [*122] vocabulary, or the "quality" of one's language, relates to cognitive, rather than adaptive, skills under the intellectual disability definition. She explained,

> Size of vocabulary is definitely intellectual — the adaptive behavior measures say nothing about how good your language is in terms of how many words you know or how complicated the words you know. It just says, can you take the words you know and communicate effectively? . . . Adaptive behavior communication does not measure level of vocabulary in any way.

(Supp. App., Disc 1, Tr., 1530.)

Moreover, the experts agreed that Hill's explanation of his "actual innocence" claim, whether to Gray, to the trial court during his *Atkins* proceedings, or to them directly, although articulate, was neither logical nor plausible. Dr. Olley testified, "It did not strike me as being entirely plausible . . . ." (*Id.* at 744.) He also stated, "This was a very long and I have to say rambling story. Because I was writing for all I was worth but I was still having quite a hard time following it all." (*Id.* at 771.) Dr. Hammer testified,

> It was quite rambling and incoherent in many places. He jumped around. And I admit that . . . the examiners kind of looked [*123] at each other and . . . shook our heads like we couldn't follow what was being said. . . . And we tried to communicate that to Danny, but he was not able to kind of change the course or back up and explain or anything like that. He just kind of started this. And in fact it was, it wasn't based on something we asked him. He just kind of started into it.

(*Id.* at 412.) Dr. Huntsman wrote in her report that after listening to the first fifteen to twenty minutes

of Hill's explanation of his "actual innocence" claim, she "revealed [her] utter confusion." (Supp. App., Disc 1, 1131.) She testified that Hill's account of the claim was "incredibly complex," but had no "logic to it." (Supp. App., Disc 1, Tr., 1031.) Dr. Sparrow opined, "The fact that it was very difficult to follow him and figure out what it was he was trying to say and where he was going means he was not doing a very good job of communicating, although he was using very nice words to do that." (*Id.* at 1532.) *See Holladay v. Allen*, 555 F.3d 1346, 1363 (11th Cir. 2009) (rejecting expert's opinion that petitioner's testimony at trial and in deposition was inconsistent with mild intellectual disability due to his vocabulary and "advanced" [*124] memory because the testimony was implausible and showed poor judgment).

It is possible that Hill had almost memorized his "actual innocence" story and was "parroting" it, like a well-rehearsed script, for the reporter and court. (*See id.* at 92-93 (Hammer test.).) When interviewing Hill, Dr. Olley noted that Hill's account of his claim was "very similar" to the "soliloquy" Hill made in court. (*Id.* at 770.) He testified, "With the ability to look back upon the tape that we just heard a few moments ago, I could see that he was recounting basically the same story spontaneously." (*Id.* at 771.) At the same time, Dr. Olley conceded that he did not know if Hill's story was true or fantasy (*id.* at 923); if Hill understood the meaning of the legal terms he used (*id.* at 925-26); or how often Hill had told that story (*id.* at 926). Dr. Hammer testified that intellectually disabled persons often develop a strong skill like this as a "cloak of competence" to hide their limitations. He explained,

> The cloak of competence is, is a concept that is talked about primarily with people with mild retardation. The idea is that many people with mild retardation are quite aware of their deficits in learning and [*125] functioning and are somewhat worried that other people will find that also. So they oftentimes will develop certain skill areas that they can hold out as indicating they have a competence in a certain area and, therefore, are trying to mask . . . what their deficits actually are[,] . . . wishing to avoid that stigmatization.

(*Id.* at 191-92.)

(ii) Hill's prison behavior

The evidence the Ohio court cites from Hill's prison records and the testimony of prison officials also is problematic. The AAMR prohibits the assessment of adaptive skills in atypical environments like prison. Its 2002 Manual instructs, "Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture." AAMR 2002 Manual, 13. It explains, "This means that the standards against which the individual's functioning must be measured are typical community-based environments, not environments that are isolated or segregated by ability." *Id.* at 8. Death row is a segregated, highly structured and regulated environment. The prison officials' description of Hill as an "average" death row inmate illustrates the problem with this evidence: what does [*126] average in this context even mean, and how does that assessment relate to the clinical definition of intellectual disability?

The experts agreed that evidence of adaptive functioning in prison, particularly death row, is of limited value because the highly structured environment limits inmates' opportunities to gain new skills or demonstrate weaknesses in existing skills. Dr. Olley wrote in his report, "Evidence of adaptive behavior in prison is limited by the confined nature of prison life. It is impossible to assess all of Mr. Hill's adaptive behavior while he is in prison." (Supp. App., Disc 1, 1124.) He testified, "Our task is an unusual and a challenging one because the standards of our profession make no explicit statement about how to evaluate a person who has been in prison for a long time." (*Id.*, Tr., 647.) Dr. Huntsman testified that formal assessments of adaptive behavior under the AAMR guidelines are "just not relevant to [the prison] setting." (*Id.* at 1130.) Dr. Hammer testified, "[Y]ou need to assess adaptive skills relative to the person functioning within the community . . . . And in this case he's obviously not functioning within the community and hasn't been functioning [*127] within the community for 20 years." (*Id.* at 407-08.)

Federal courts similarly have discounted this type of evidence as an unreliable measurement of adaptive functioning. *See, e.g., Holladay*, 555 F.3d at 1358 n.16 ("Both experts agreed that Holladay's adaptive functioning cannot be accurately assessed now because he has spent over 17 years in prison, a highly restricted and restrictive environment."); *Thomas*, 614 F. Supp. 2d at 1284 n.67 ("The constraints of a maximum-security prison environment also limit the diagnostician's ability to assess the subject's adaptive skills consistently within the AAMR definition."); *Rodriguez v.*

Quarterman, No. Civ. SA-05-CA-659-RF, 2006 U.S. Dist. LEXIS 49376, 2006 WL 1900630, at *11 (W.D. Tex. 2006) ("there is considerable debate within the professional literature over whether it is even possible to perform an adaptive skills deficit evaluation in a prison setting").

Moreover, courts have questioned the credibility and veracity of testimony offered by prison employees regarding a death row inmate's intellectual disability. In *Hall v. Quarterman*, 534 F.3d 365 (5th Cir. 2008), the Fifth Circuit observed,

> These witnesses, given the nature of their job and its accompanying dangers, may [*128] not be inclined to volunteer evidence of mental retardation to state prosecutors. Additionally, . . . the guards demonstrated only vague and largely irrelevant understandings of mental retardation while simultaneously asserting that Hall appeared normal.

Id. at 395. Commentators have noted particularly that prison officials may feel bias against inmates or pressured by peers or supervisors to report a high level of functioning. *See, e.g.*, John M. Fabian, *Life, Death, and IQ; It's Much More Than Just a Score: The Dilemma of the Mentally Retarded on Death Row*, 5(4) J. Forensic Psychol. 13-14 (2005) (noting problems with correctional staff as source of information about adaptive functioning because they "may be plagued by certain biases for or against the defendant," "officers may have their own lay opinions on what retardation is and may also not believe these defendants are retarded because they are criminals and function fairly well in some areas," and some officers are "more likely to have experienced conflicts

with the defendants which may cause bias against the defendant in an evaluative setting").[25]

Aside from potential biases, the prison officials' testimony at Hill's hearing was rife with contradictions, with themselves and each other. Risinger told the experts during her interview that she saw Hill print out kites, or internal communications between prison inmates and employees, "with speed one to two times." (Supp. App., Disc 1, 1113; *see also id.* at 1123, 1137.) But she admitted during her testimony at the hearing that she did not actually see Hill write any kites. (Supp. App., Disc 1, Tr., 1339, 1347.) Risinger also acknowledged on cross-examination that the handwriting in Hill's kites varied and may have been written by other inmates, which was a common practice. (*Id.* at 1348-50.) Similarly, Morrow testified first that Hill could read and write his kites, but later admitted that he had never seen Hill write a kite. (*Id.* at 1254, 1265.)

Regarding Hill's hygiene, the appellate court cited [*130] Risinger's observation that Hill's self-care was "poor but not terrible," but also that Hill had to be reminded at times about his hygiene. (Supp. App., Disc 1, 1113.) However, Spicer reported that Hill "didn't like to shower or clean his cell." (*Id.* at 1114.) Morrow described Hill's hygiene as "poor" during his

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[25] For this reason, it is worth questioning whether any inmate who asserts an *Atkins* [*129] claim after being incarcerated for a long period of time can prevail on the claim once a court chooses to evaluate the petitioner's current rather than past intellectual abilities, assessing adaptive behavior while on death row and according great weight to the testimony of prison officials.

interview but later testified that Hill never had a "hygiene issue" and kept his cell "clean." (*Id.* at 1114, 1123; Tr., 1251.)

As to Hill's card playing, Spicer believed that the other inmates might have let Hill play cards with them because he would lose money to them. (Supp. App., Disc 1, 1114.) Risinger also said that Hill lost money playing cards. (*Id.* at 1123.) Dr. Huntsman reported that Glenn said Hill "augmented his monthly earnings by winning at card games."[26] (*Id.* at 1138.) But Glenn testified at the hearing that he did not observe the betting and could not prove the inmates were even betting at all. (Supp. App., Disc 1, Tr., 789-90.)

Also contrary to the [*131] guidelines, aside from noting Risinger's observation about Hill's "poor but not terrible" hygiene, the court again focused exclusively on the prison officials' observations of Hill's adaptive strengths rather than limitations. Furthermore, their testimony that Hill "interacted with the other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules" does not describe behaviors that are necessarily inconsistent with intellectual disability. As explained above, intellectually disabled persons can "interact" with others, play simple games, perform menial jobs, keep track of a small amount of money, and obey clear rules. There was no evidence that Hill's relationships with other inmates were anything more

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[26] Interestingly, Dr. Hammer reported that Glenn stated that "Danny wasn't exploited [at cards] and he never lost that much." (*Id.* at 1115.) Dr. Olley did not mention Glenn's observation of Hill's card playing at all.

than superficial, or that the games he played required any skill. The prison officials acknowledged that his prison job required minimum skills, the prison rules were clear and straightforward, and that he never had more than a minimal amount of money to keep track of in his account at any given time.[27] (Supp. App., Disc 1, 1115, 1123; Tr., 1207, 1272, 1273.) *See also* DSM-IV-TR, 43 ("During their adult years, [mildly [*132] intellectually disabled persons] usually achieve social and vocational skills adequate for minimum self-support.").

This Court's review of Hill's prison records indicates that Hill struggled to adjust to life on death row and exhibited adaptive deficits during his early years in prison. A prison psychiatrist wrote less than a year after Hill was convicted:

> Hill is not doing too well. He has a hard [*133] time putting up with all the aggravation and teasing and threatening that goes on on K-4. . . . He is very difficult to follow and apparently has some serious identity problems

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[27] Hill's prison jobs included emptying trash cans and distributing color-coded cleaning supplies to inmates' cells. (Supp. App., Disc 1, Tr., 1340, 1372-33, 1381, 1265, 810-12.) Spicer and Morrow noted that Hill needed simple and specific instructions to perform even these duties. (Supp. App., Disc 1, 1114.) As to Hill's account with the cashier's office, he received between $3 and $16 monthly pay and rarely had more than a small amount in his account at any given time. (*Id.* at 1556, 1559, 1560, 1568, 1570, 1571, 1575, 1577; Tr., 1207-09.) Morrow's example of Hill's skill dealing with his account is that Hill realized a mistake was made when he received $3 instead of the $16 in monthly wages — hardly a sophisticated observation of a complex financial transaction. (*Id.* at 1114; Tr., 1252-53.)

> in that he doesn't know who his kin is and then also has some strange beliefs, as when he tells me that various so-called kin have told him things and subsequently died and he somehow establishes a connection between the two. He isn't hearing from anybody, is not getting any visitors, cannot read or write, so has had no contact with his lawyer and is very concerned that he should have been in a mental hospital . . .
>
> All in all, it is a very confusing situation . . . .

(Supp. App., Disc 1, 996.) This psychiatrist considered Hill intellectually disabled during this time. (*Id.* at 992, 998-99.) He wrote in his notes on April 9, 1987,

> We did get the report in from TCY which shows [Hill] to be actually retarded. I plan to call Dennis Watkins in Warren to see if he has more information because it is rather puzzling that somebody with his retardation would end up on death row.

(*Id.* at 998-90.)

Hill routinely requested help with his commissary account and was confused about its balance and the status of checks sent to him [*134] from family members. (Supp. App., Disc 1, 1484, 1485, 1556, 1557, 1560, 1571, 1565, 1568.) He repeatedly violated prison rules. (*See id.* at 1343, 1351-1425.) There also is ample evidence that Hill's social skills were poor. Prison records show that Hill was "passive" and "easily led," harassed by other inmates, found unsuitable to share a cell, was afraid of other inmates and frequently requested to move to another

cell to avoid them, and often fought with other inmates. (Supp. App., Disc 1, 980, 1318, 1343, 1389, 1390, 1393, 1394, 1419, 1462, 1465, 1466-68, 1482-84, 1557, 1567.) And the records show that Hill was reprimanded for refusing to take a shower and often had to be provided a toothbrush and toothpaste. (Supp. App., Disc 1, 1396, 1573, 1568.) A prison sergeant reported in 1988 that Hill "[s]eems dull and unintelligent, . . . [s]luggish and drowsy," "[t]ries, but cannot seem to follow directions," "[c]ontinually asks for help from staff," and "[n]eeds constant supervision." (*Id.* at 1343.)

But the evidence also demonstrates that Hill's adaptive skills improved by 1994. A mental health evaluation form from 2001 stated that Hill's institutional adjustment was "[p]oor at first but [*135] appears to have adjusted well after 1994." (Supp. App., Disc 1, 1005.) Also in 2001, a psychiatrist also noted that Hill's "conversation to [him] was very brief but [he] noted no gross abnormalities. His speech was simple but clear, logical and coherent." (*Id.* at 993.) After 1994, Hill was charged with only one offense in prison, stemming from a fight with another inmates in 1996. (*Id.* at 1352-54.) He also received good evaluations on his job performance from 1992 to 1994. (*Id.* at 1328-32.) One evaluator reported, "Inmate Hill does an excellent job on keeping the range clean. He didn't need to have [*sic*] told what to do he would just do it." (*Id.* at 1332.)

Notably, Hill told the experts that Officer Glenn, who supervised Hill and other death row inmates for seven years, knew him best. (*Id.*, Tr., 786, 1042.) And Officer Glenn testified that Hill performed his job as

a material handler well with minimal assistance and no modifications, handled his money well, sought medical care when he needed it, kept track of his time allotted with his attorneys, and that "Danny [was] slow when he want[ed] to be slow." (*Id.* at 787-89, 792, 793, 794-95, 815.) Except for his account of Hill's card playing, [*136] as noted above, Officer Glenn's testimony was similar to the other prison officials and to his interview with the experts. He found Hill "typical in most areas of skills compared to other inmates" (Hammer report, Supp. App., Disc 1, 1155); "social with other inmates" (Huntsman report, *id.* at 1138); and "better than most" at keeping track of his commissary (*id.*).

The clinical guidelines account for such improvements in adaptive behavior, acknowledging that it is possible for an intellectually disabled person to improve in adaptive skills such that the diagnosis will no longer apply, although it is rare and generally occurs with considerable interventions and supports. The APA explains,

> After early childhood, the disorder is generally lifelong, although severity levels may change over time. . . . Early and ongoing interventions may improve adaptive functioning throughout childhood and adulthood. In some cases, these result in significant improvement of intellectual functioning, such that the diagnosis of intellectual disability is no longer appropriate. . . . Diagnostic assessments must determine whether improved adaptive skills are the result of a stable, generalized new skill acquisition [*137] (in which case the diagnosis of intellectual disability may no longer be

> appropriate) or whether the improvement is contingent on the presence of supports and ongoing interventions (in which case the diagnosis of intellectual disability may still be appropriate).

DSM-V, 39. *See also* AAMR 2002 Manual, 9 (although intellectual disability is a static condition, improved functioning in adulthood is expected "with appropriate personalized supports over a sustained period").

(3) expert opinions

The court of appeals stressed that the trial court ultimately was persuaded by the State's expert, Dr. Olley, and the independent expert, Dr. Huntsman. The court explained:

> Finally, the trial court relied on the expert opinions of Drs. Olley and Huntsman that, with reasonable psychological certainty, Hill's adaptive skill deficiencies do not meet the second criterion for mental retardation set forth in *Lott*. Both doctors relied, in part, on the same anecdotal evidence considered by the trial court. The doctors also conducted interviews with Hill and particularly noted Hill's memory of events surrounding Fife's murder 20 years before and his ability to recount the narrative of the events and the complex [*138] legal history of his case since that time.

Hill, 177 Ohio App. 3d at 193, 894 N.E.2d at 125.

As already discussed, both the United States and Ohio supreme courts have emphasized the critical role the medical community and its clinical

standards play in defining and determining intellectual disability when considering eligibility for the death penalty. In *Hall v. Florida*, the Supreme Court explained,

> That this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising. Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue. And the definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty: for it is relevant to education, access to social programs, and medical treatment plans. In determining who qualifies as intellectually disabled, it is proper to consult [*139] the medical community's opinions.

Hall, 134 S. Ct. 1986 at 1993. And Ohio's highest court expressly mandated in *Lott* that courts "rely on professional evaluations of [a defendant's] mental status, and consider expert testimony, appointing experts if necessary, in deciding this matter." *Lott*, 97 Ohio St. 3d at 306, 779 N.E.2d at 1015.

The AAMR, in turn, emphasizes the importance of the practitioner's critical judgment in assessing intellectual disability. It states, "Judgments made by conscientious, capable, and objective individuals can

be an invaluable aid in the assessment process."[28] AAMR 2002 Manual, 94 (internal quotation marks and citations omitted). It defines clinical judgment as "a special type of judgment that emerges directly from extensive data and is rooted in a high level of clinical expertise and experience. . . . [I]ts use enhances the precision, accuracy, and integrity of the clinician's decisions and recommendations." AAIDD User's Guide, 23. And notes that "it is crucial that clinicians conduct a thorough social history and align data and data collection to the critical question(s) at hand." *Id.*

Thus, habeas courts must defer to state-court determinations of the credibility of expert witnesses in determining intellectual disability under *Atkins*—especially in such a highly subjective area as adaptive behavior. The Sixth Circuit, in denying a habeas petitioner's *Atkins* claim, recently concluded that two expert opinions

> provided a basis for the state court to reasonably determine that O'Neal does not suffer from significantly subaverage intellectual functioning. And without clear and convincing evidence undermining the credibility of [those experts], we are not persuaded by O'Neal's attempts to emphasize solely the portions of [his expert's] testimony

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[28] It also cautioned, "Inaccurate, biased, subjective judgment can be misleading [*140] at best and harmful at worst." *Id.* Clinical judgment must not be "(a) a justification for abbreviated evaluations, (b) a vehicle for stereotypes or prejudices, (c) a substitute for insufficiently explained questions, (d) an excuse for incomplete or missing data, or (e) a way to solve political problems." AAIDD User's Guide, 23.

> that support his claim. For better or worse, as a habeas court, we are not in a position to pick and choose which evidence we think is best so long as the presumption of correctness remains unrebutted. *See* [*141] 28 U.S.C. § 2254(e)(1).

O'Neal v. Bagley, 743 F.3d 1010, 1022 (6th Cir. 2013). The court stressed, "With expert testimony split, as it often is, the state court chose to credit [the two experts] over [petitioner's expert], and we cannot say from this vantage that it was unreasonable to do so." *Id.* at 1023.

(a) Drs. Olley and Huntsman's opinions

As explained above, three psychologists provided opinions on Hill's mental status for the state trial court: Dr. Olley for Respondent, Dr. Hammer for Hill, and Dr. Huntsman, who was appointed by the court.[29] At the time of the hearing, Dr. Olley was a psychologist and associate director of the Clinical Center for the Study of Development and Learning and clinical professor in the Department of Allied Health Sciences at the University of North Carolina at Chapel Hill. He had been a clinical psychologist for more than thirty years and affiliated with the university for about twenty-five of those years. He had worked almost exclusively in the specialty of intellectual and related disabilities and was a fellow of the American Association on Mental Retardation. (Supp. App., Disc 1, Tr., 636-37.) Dr. Olley had testified in nine capital cases regarding [*142]

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[29] Two additional psychologists testified at the hearing, Drs. Sparrow and Hancock. Their testimony, however, was admitted only to clarify issues related to adaptive skills testing.

defendants' intellectual abilities, each time on behalf of the defendant. (*Id.* at 643-44.) Dr. Hammer had similarly impressive credentials. He was a clinical psychologist, director of psychology services at the Nisonger Center of The Ohio State University, and an adjunct associate professor of psychology at that university. He had been a clinical psychologist for about twenty years, specializing in the area of intellectual disability. (*Id.* at 142-44.) Dr. Huntsman was a forensic psychologist at the Forensic Psychiatric Center of Northeast Ohio, Inc. Her primary focus was on court-ordered evaluations for competency, which are not performed under the AAMR or APA guidelines. (*Id.* at 992-94.) When she did evaluate for intellectual disability, she testified that she relied only on IQ scores, and had assessed adaptive skills only "maybe a handful of times." (*Id.* at 980-81.)

The three experts agreed on the procedures to be followed in evaluating Hill, and observed each other's interviewing and test administration. [*143] (*Id.* at 929; Supp. App., Disc 1, 1118.) They each tested Hill, interviewed Hill and others, visited the prison, and reviewed Hill's school, court and prison records. Dr. Olley testified that it was the "most thorough examination of a death row inmate that [he had] been involved with." (Supp. App., Disc 1, Tr., 773.)

The trial court found the opinions of Drs. Olley and Huntsman most persuasive. They both testified that, *at the time of the hearing*, which was the focus of their evaluations, Hill did not demonstrate the requisite level of adaptive limitations to meet the standard of intellectual disability. Dr. Olley was circumspect in his opinion, careful to note the limited

amount of information regarding Hill's present adaptive functioning. He wrote in his report, "The available information on Mr. Hill's current functioning does not allow a diagnosis of mental retardation."[30] (Supp. App., Disc 1, 1124-25.) Dr. Huntsman was more categorical. She opined, "Mr. Hill's level of adaptive behavior certainly exceeds the level expected of a mildly mentally retarded individual." (*Id.* at 1141.)

Drs. Olley and Huntsman both found Hill's statements to the court and interviews with the reporter and themselves to be very significant. Dr. Olley specifically was impressed by Hill's ability to recall details of past events and "to express a complex explanation of the crime in order to support his claim of innocence." (*Id.* at 1125.) He testified that Hill's reading during his Gray interview "sounded substantially above the abilities that I would associate with a person with mental retardation" because he read with speed, accuracy

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[30] Dr. Olley elaborated on stand:

> I stated earlier that any evaluation that involves retrospective information [*144] is not perfect. And in order to compensate for missing information or partial information it's important to gather information from as many sources as possible over as many years as possible.
>
> So with that caution in mind, I felt that my conclusion was that since in this format the burden is upon the defense to show that mental retardation exists, that I had not seen sufficient information in, particularly in the areas of adaptive behavior to find that I could support a diagnosis of mental retardation.

(*Id.*, Tr., 774.)

and intonation. (App. Supp., Disc 1, Tr., 1764.) He also stated that he did not believe an intellectually disabled person could recite that much [*145] information from memory, particularly when he spoke for such a long period of time. (*Id.*) He explained that Hill's ability "to put the emphasis on just the right word to make a point effectively, that I have not seen in people with mental retardation who memorize things or have, say things because they've said it many times before." (*Id.* at 1783.) He testified that Hill's reading and recitation of his innocence claim just "hit [him] between the eyeballs that this is not a man with mental retardation. So it's just a judgment." (*Id.* at 1785.) Similarly, Dr. Huntsman testified that Hill's statements displayed "energy and organization and directedness in terms of having a story to tell." (*Id.* at 1027.) She also described her interview with Hill as "remarkable for how rich in content it was and rich in the use of language and rich in the memory for people and events. And also rich in the sense . . . of the way he volunteered and initiated giving me, you know, he didn't just say a sentence and stop. He kept going. It was incredibly spontaneous." (*Id.* at 1032.)

Both experts also cited the testimony of the prison officials as persuasive, although Dr. Olley was careful to acknowledge the limitations [*146] of assessing adaptive behavior in prison. (App. Supp., Disc 1, 1124.) They placed significance on the fact that the six prison officials reported consistent information about Hill's behavior on death row, and each witness described Hill as an "average" inmate. (*Id.* at 1124, 1141; *see also* Supp. App., Disc 1, Tr., 772-73.)

Finally, both experts stressed that Hill's malingering on their tests and during their interviews was an important factor in forming their opinions. Dr. Olley testified, "[I]n my experience I had never encountered a person with mental retardation who was able to malinger or fake bad as consistently as Mr. Hill did in the evaluation that we performed . . . ." (Supp. App., Disc 1, Tr., 781; *see also* Supp. App., Disc 1, 1124-25, 1140.)

As to Hill's adaptive functioning in childhood and at the time of the offense, Dr. Olley stated in his report that "[t]oo little information is available about adaptive behavior in childhood to make a confident retrospective diagnosis of mental retardation." (Supp. App., Disc 1, Tr., 780, 783.) He conceded on stand that Hill "did function low in academic skills" and "his school personnel regarded him as a person with mental retardation and [*147] labeled him as such," but explained that educators had an interest in diagnosing intellectual disability to obtain benefits for children as well as an interest in avoiding the possible stigma of labeling them. (*Id.* at 783, 828-29.)

Dr. Huntsman did not provide an opinion as to whether Hill was intellectually disabled during those time periods in her report, but testified at the hearing that he "probably" was not. (*Id.* at 1052-53.) Although she acknowledged on cross-examination that Hill's school records showed academic deficits and some limitations in communication, self-direction and social skills, she agreed with Dr. Olley that there was insufficient information from which to draw a conclusion about Hill's adaptive behavior during those time periods. (*Id.* at 1098-1100, 1112.) Dr. Huntsman specifically discounted the diagnoses

of Hill rendered by school and juvenile court psychologists because the tests were conducted for a different purpose and the psychologists' "tendency of diagnostic overinclusion." (*Id.* at 1046, 1105.)

Dr. Olley acknowledged that Hill presented a "close call." (*Id.* at 861.) He testified that Hill's case may be one of the rare instances of a person's skills improving [*148] in adulthood to such a degree that he or she does not meet the second prong of adaptive behavior and no longer can be diagnosed as intellectually disabled. (*Id.* at 861-62.)

(b) *State v. White*

The Ohio appellate court finished its analysis of Hill's adaptive skills by distinguishing Hill's case from the Ohio Supreme Court case *State v. White*, 118 Ohio St. 3d 12, 2008 Ohio 1623, 885 N.E.2d 905 (Ohio 2008). It explained:

> It is important to note that the trial court's use of anecdotal evidence in the present case is distinguishable from the use of such evidence in *White*, 118 Ohio St.3d 12, 2008 Ohio 1623, 885 N.E.2d 905. In *White*, the Ohio Supreme Court reversed a trial court's finding that an *Atkins* petitioner is not mentally retarded where the trial court had relied on anecdotal evidence, such as the fact that the petitioner had a driver's license and could play video games, to support its finding that the petitioner did not demonstrate significant deficits in adaptive skills.
>
> In the present case and in *White*, the trial court relied upon its own perceptions and other lay testimony that the petitioner

appeared to function normally. The Supreme Court held that this reliance constituted an abuse of discretion [*149] in light of expert testimony that "retarded individuals 'may look relatively normal in some areas and have * * * significant limitations in other areas.'" (Emphasis sic.) *Id.* at ¶ 69.

The difference between the two cases lies in the fact that in the present case, two of the expert psychologists considered the same anecdotal evidence as the trial court and concluded that Hill was not mentally retarded. The trial court's conclusions were consistent with and supported by the expert opinion testimony. In *White*, the two psychologists who examined the petitioner concluded that there were significant deficiencies in two or more areas of adaptive functioning. *Id.* at ¶ 21. Thus, the trial court in *White* had substituted its judgment for that of the qualified experts. "While the trial court is the trier of fact, it may not disregard credible and uncontradicted expert testimony in favor of either the perceptions of law witnesses or of the court's own expectations of how a mentally retarded person would behave. Doing so takes an arbitrary, unreasonable attitude to the evidence before the court and [results] in an abuse of discretion." *Id.* at ¶ 74.

Another difference is that in *White*, the experts [*150] were able to administer the SIB-R to the petitioner and obtain a psychometrically reliable measurement of his adaptive functioning. *Id.* at ¶ 14-20. In the

> present case, the only qualitative measurement of Hill's adaptive functioning, the Vineland I test administered when Hill was 17, indicated that Hill functioned at a level above that of the mentally retarded. Apart from this test, the trial court in the present case had no choice but to rely on anecdotal evidence and/or Drs. Olley and Sparrow's doubtful extrapolations of Hill's adaptive ability.

Hill, 177 Ohio App. 3d at 193-94, 894 N.E.2d at 125-26.

Hill claims that the court ignored *White*'s holding "when it substituted its own judgment based on its own observations for the overwhelming historical data available regarding Danny Hill's mental retardation." (ECF No. 94, 21.) But that argument fails, since the court here did rely on facts from the record to support its conclusion. Moreover, as the court of appeals stated, the trial court here also relied on the expert opinions of Drs. Olley and Huntsman.

(4) conclusion

The Ohio appellate court concluded, "In light of the foregoing, there is abundant competent and credible evidence to support [*151] the trial court's conclusion that Hill does not meet the second criterion for mental retardation." *Id.* at 194, 894 N.E.2d at 126. Based on its review of the entire record, this Court finds that Hill has not carried his burden of rebutting by clear and convincing evidence the presumed correctness of the Ohio appellate court's decision. The court's conclusion regarding Hill's adaptive behavior *at the time he filed his*

Atkins *claim* was supported by sufficient credible evidence and, most importantly, the opinions of two experts. Although "[r]easonable minds reviewing the record might disagree" about some of the Ohio court's findings on this issue, and certain "evidence . . . may plausibly be read as inconsistent with the [state-court] finding," for this Court, "on habeas review[,] that does not suffice to supersede the trial court's . . . determination." *Wood*, 558 U.S. at 301-02 (internal quotation marks and citations omitted).

c. onset before age 18

Finally, the state court of appeals agreed with the trial court that Hill did not meet the third criterion for intellectual disability under *Lott*. It stated:

> With respect to the third criterion, the trial court found that Hill had failed to demonstrate [*152] the onset of mental retardation before the age of 18. The trial court's conclusion mirrors its findings under the first two criteria: Hill demonstrated, by a preponderance of the evidence, significantly subaverage intellectual functioning prior to the age of 18, but failed to demonstrate significant limitations in two or more adaptive skills. The evidence supporting the trial court's conclusions is discussed above.

Hill, 177 Ohio App. 3d at 194, 894 N.E.2d at 126. As noted above, a reasonable trial-court judge may have concluded that, based on the record, Hill had severe adaptive deficits in childhood and therefore met this prong of the intellectual disability definition. But the state court did not so determine in this case, and Hill has not met his burden of proving that the state

court's determination was erroneous or unreasonable.

4. Conclusion

Atkins holds that "the mentally retarded should be categorically excluded from execution," and that "death is not a suitable punishment for a mentally retarded criminal." *Atkins*, 536 U.S. at 318, 321. But the Supreme Court also repeatedly has made it clear that AEDPA imposes a "formidable barrier to federal habeas relief for prisoners whose [*153] claims have been adjudicated in state court." *Burt*, 134 S. Ct. at 15. Although the Court recognizes that a reasonable trial-court judge may have come to a different conclusion based on the evidence presented at Hill's *Atkins* hearing, given the extremely deferential standard for relief under AEDPA, this Court cannot hold that Hill has rebutted with clear and convincing evidence the presumed correctness of the Ohio appellate court's factual determination that Hill is not intellectually disabled. *See* 28 U.S.C. § 2254(e)(1). Nor can this Court conclude that the state-court decision denying Hill's *Atkins* claim was unreasonable "beyond any possibility for fairminded disagreement." *Harrington*, 131 S. Ct. at 787. Accordingly, this claim is denied.

B. *Second Ground for Relief: Ineffective Assistance of* Atkins *Counsel*

Hill's second claim for relief is that he was deprived of his constitutional right to the effective assistance of counsel in his post-conviction *Atkins* hearing. Respondent argues that this claim is not cognizable on habeas and lacks merit. (ECF No. 98, 6.) Hill counters that his *Atkins*-related ineffective-assistance claim should be recognized based on the

United States Supreme Court's [*154] Sixth and Fourteenth Amendment jurisprudence. (ECF Nos. 94 and 102.)

1. Procedural Posture

Respondent contends that Hill's *Atkins*-related ineffective-assistance claim is unexhausted. (ECF No. 98, 6.) Hill replies that it is not, because no mechanism exists in Ohio for such a claim. Hill explains that, because *Atkins* was decided after his trial, under *Lott*, he had to raise his *Atkins* claim for the first time on post-conviction, and Ohio limits post-conviction relief to constitutional claims, which does not include ineffective assistance of post-conviction counsel. (ECF No. 102, 23-24.) The Court agrees. A habeas court need not wait for exhaustion if it determines that a return to state court would be futile. *Lott v. Coyle*, 261 F.3d 594, 608 (6th Cir. 2001).

2. Viability of Atkins-related ineffective-assistance claims in habeas corpus

Respondent's stronger argument is that Hill's ineffective-assistance claim is barred by AEDPA's § 2254(i). It provides: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). This provision is grounded in [*155] the well-settled rule that the constitutional right to appointed counsel extends to the first appeal of right and no further. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). Accordingly, there is no constitutional right to appointed counsel in habeas cases, *McCleskey v. Zant*, 499 U.S. 467, 494, 111 S.

Ct. 1454, 113 L. Ed. 2d 517 (1991), or during state post-conviction collateral review, *Coleman v. Thompson*, 501 U.S. 722, 752-53, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). And, as there is no constitutional right to an attorney in post-conviction proceedings, a habeas petitioner cannot claim unconstitutional deprivation of effective assistance of counsel in such proceedings. *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415, 425 (6th Cir. 2003) (citing *Coleman*, 501 U.S. at 752-53).

Hill strenuously argues that, in accordance with his Sixth Amendment right to effective representation and his Fourteenth Amendment rights to due process and equal protection, he should have the same opportunity to assert an ineffective-assistance claim related to representation during an *Atkins* hearing held post-conviction under *Lott*, as a defendant does who was convicted and sentenced after *Atkins* was decided and therefore could assert his *Atkins* claim at trial. (ECF No. 102, 23-47.) [*156] As support, he points to the Tenth Circuit's decision in *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012). (ECF No. 149.) In that case, the court held that there is a constitutional right to effective assistance of counsel in *Atkins* proceedings. It grounded its decision in the Sixth and Fourteenth Amendments, and further concluded that "the right to counsel flows directly from, and is a necessary corollary to, the clearly established law of *Atkins*." *Id.* at 1184. The Tenth Circuit did not address § 2254(i) at all, however, or identify any other court that reached the same decision. Nor does Hill identify any court that has followed *Hooks*. Indeed, another judge in this district and a judge in the Southern District of Ohio expressly have rejected these arguments. *See*

Bays v. Warden, Ohio State Penitentiary, No. 3:08-CV-076, 2014 U.S. Dist. LEXIS 627, 2014 WL 29564, at **3-4 (S.D. Ohio Jan. 3, 2014) (Rose, J.); *Williams v. Mitchell*, No. 1:09-CV-2246, 2012 U.S. Dist. LEXIS 141852, 2012 WL 4505774, at **22-28 (N.D. Ohio Sept. 28, 2012) (Nugent, J.).

Despite the equitable appeal of Hill's arguments, there is no Supreme Court or Sixth Circuit authority holding that § 2254(i) is unconstitutional or otherwise not controlling in this case. *See Post v. Bradshaw*, 422 F.3d 419, 423-24 (6th Cir. 2005) [*157] (finding § 2254(i) "clear" and "expansive in its prohibition" and holding that Rule 60(b) cannot therefore be used to bring claims of ineffective assistance of habeas counsel). Section 2254(i), therefore, bars Hill's *Atkins*-related ineffective-assistance claim.

3. Merits

Even if Hill's ineffective-assistance claim were cognizable in habeas, it would fail. Hill claims that his counsel:

1. failed to argue or bring to the court's attention material and substantive facts from the record that established adaptive skill deficits;

2. failed to intervene or object when Detective James Teeples ("Teeples") videotaped Hill's Atkins testing;

3. failed to properly investigate by not contacting school and prison psychologists and death row inmates;

4. failed to object to the proceedings on competency grounds;
5. "was forced to" proceed despite his antagonistic relationship with Hill; and
6. failed to object to "the fanatical prosecution" of Hill's claim.

(ECF No. 94, 50-51.) Respondent replies, without any support or analysis, that the claim should be "denied as without merit . . . and frivolous, where Hill's trial counsel Meyers demonstrated a national level performance that few, if any, career capital [*158] defenders could meet, and none could exceed." (ECF No. 98, 6.)

a. legal standards

To succeed on a claim of ineffective assistance of counsel, a petitioner must satisfy the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id* at 687. To determine if counsel's performance was "deficient" pursuant to *Strickland*, a reviewing court must find that the representation fell "below an objective standard of reasonableness." *Id.* at 688. It must "reconstruct the circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

Second, the petitioner must show that he or she was prejudiced by counsel's errors. To do this, a petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "It is not enough 'to show that the errors had some conceivable [*159] effect on the outcome of the proceeding.'" *Id.* at 693 (citation omitted). Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

If a petitioner fails to prove either deficiency or prejudice, his ineffective-assistance claim will fail. *See Lundgren v. Mitchell*, 440 F.3d 754, 770 (6th Cir. 2006) (citing *Strickland*, 466 U.S. at 697). The Supreme Court recently explained, "Surmounting *Strickland*'s high bar is never an easy task. . . . An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011) (citations and internal quotation marks omitted).

Thus, as the Supreme Court often has repeated, "[j]udicial scrutiny of a counsel's performance must be highly deferential'" and "every effort [must] be made to eliminate the distorting effects of hindsight . . . ." *Strickland*, 466 U.S. at 689. The Court recently [*160] emphasized, "*Strickland* specifically commands that a court 'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment,'" recognizing "the constitutionally

protected independence of counsel and . . . the wide latitude counsel must have in making tactical decisions." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1406-07, 179 L. Ed. 2d 557 (2011) (quoting *Strickland*, 466 U.S. at 689-90).

Under AEDPA, a habeas court is limited to determining whether a state-court decision regarding an ineffective-assistance claim was contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1); *Mitchell v. Mason*, 325 F.3d 732, 737-38 (6th Cir. 2003) (holding ineffective assistance of counsel is mixed question of law and fact to which the unreasonable application prong of § 2254(d)(1) applies). The Supreme Court recently observed that the standards imposed by *Strickland* and § 2254(d) are both "highly deferential," so that in applying them together, "review is 'doubly' so." *Harrington*, 131 S. Ct. at 788. Therefore, "the question is not whether counsel's actions were reasonable. The question is whether there is any [*161] reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

b. analysis

(1) failure to investigate and present evidence

Hill claims that his *Atkins* counsel was ineffective for failing to investigate and present material evidence that established his adaptive skills deficits. (ECF No. 94, 52-60.) Specifically, he asserts that his counsel should have contacted school psychologists Karen Weiselberg and Annette Campbell, prison psychiatrist John Vermeulen, a psychologist who tested Hill for the prison in 2000, and other death row inmates. He also argues that counsel should

have presented the testimony of Hill's family members, such as his mother and "other aunts and uncles who lived in the area." The Court disagrees.

A defendant's attorney is responsible for making tactical decisions of trial strategy. A petitioner claiming ineffective counsel, therefore, must show that his or her counsel's actions were not supported by a reasonable strategy. *Strickland*, 466 U.S. at 689. The Supreme Court has made clear, however, that merely labeling an attorney's decision "trial strategy" does not end the inquiry; the strategic decision itself must be the product of a reasonable investigation. [*162] The *Strickland* Court set forth this duty to investigate, explaining:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland, 466 U.S. at 690-91. The Sixth Circuit has found ineffective assistance in numerous cases where counsel failed to conduct an adequate investigation, including interviewing potentially important witnesses, or did not present important testimony or evidence at trial. *See, e.g., Ramonez v. Berghuis*, 490 F.3d 482, 491 (6th Cir. 2007) (finding ineffectiveness where counsel decided not to interview three

potential witnesses who could have corroborated defendant's testimony and contradicted complaining witness' testimony); *Towns v. Smith*, 395 F.3d 251 (6th Cir. 2005) (finding ineffectiveness where counsel decided not to interview a potentially important [*163] witness); *Combs v. Coyle*, 205 F.3d 269, 278 (6th Cir. 2000) (finding ineffectiveness where counsel failed to investigate adequately his own expert witness, who testified that, despite the defendant's intoxication at the time of the crime, the defendant nevertheless was capable of forming the requisite intent to commit the crimes); *Groseclose v. Bell*, 130 F.3d 1161, 1170 (6th Cir. 1997) (finding ineffectiveness where counsel had no strategy and conducted no investigation at all).

Nevertheless, the Supreme Court has stated that "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005). It further has instructed, "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. Accordingly, the Sixth Circuit repeatedly has concluded that an attorney's pretrial investigation and decisions in presenting [*164] evidence and testimony was reasonable given the circumstances. *See, e.g., Landrum v. Mitchell*, 625 F.3d 905, 921-22 (6th Cir. 2010) (finding no ineffective assistance where petitioner failed to show prejudice resulting from trial counsel's failure to

conduct proper investigation or interview potential witnesses, and present important lay and expert testimony); *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997) (finding no ineffective assistance where counsel did not call witnesses with credibility and reliability problems).

Here, the Court finds neither deficient representation nor prejudice. First, it is clear from the hearing transcript that Hill's counsel's strategy was to rely on the expert testimony of Dr. Hammer and to have Dr. Hammer interpret the facts in the record for the court in light of the clinical guidelines. He explained to the court, in objecting to the prison guards' testimony as inadmissible lay opinion, that it is more appropriate for "a psychologist to filter factual data relative to Prong II . . . than from factual anecdotal being delivered directly to this Court." (Supp. App., Disc 1, Tr., 1245; *see also id.* at 560-72.)

This strategy accords with the Ohio Supreme [*165] Court's emphasis in *Lott* and *White* on expert testimony in *Atkins* proceedings. In *Lott*, the court instructed trial courts to "rely on professional evaluations of [a defendant's] mental status, and consider expert testimony, appointing experts if necessary, in deciding this matter." *Lott*, 97 Ohio St. 3d at 306, 779 N.E.2d at 1015. The court added in *White*,

> While the trial court is the trier of fact, it may not disregard credible and uncontradicted expert testimony in favor of either the perceptions of lay witnesses or of the court's own expectations of how a mentally retarded person would behave. Doing so shows an arbitrary, unreasonable attitude toward the

> evidence before the court and constitutes an abuse of discretion.

White, 118 Ohio St. 3d at 24, 885 N.E.2d at 915-16.

Second, the testimony of Drs. Weiselberg-Ross, Campbell, and Vermeulen would have been cumulative, since their notes, reports, and letters were admitted into evidence and discussed at length by both parties' experts. Similarly, Hill's mother and grandmother testified at Hill's mitigation hearing, and the transcripts of their testimony also were admitted into evidence at the *Atkins* hearing. (*See* Supp. App., Disc 1, 1104.)

Third, [*166] it is not reasonably probable that the result of Hill's *Atkins* hearing would have been different had Dr. Spindler, other family members, and death row inmates testified. Hill admits that Dr. Spindler "does not recall Danny Hill or why he administered the test to him." (ECF No. 94, 57.) The testimony of additional family members and other death row prisoners would have been equally weak.

These sub-claims are meritless.

(2) failure to challenge Hill's competency

Hill argues that his counsel should have objected to the entire *Atkins* hearing on competency grounds. (*Id.* at 60-63.) The trial court did, however, hold a hearing on Hill's competency on December 7, 2006, less than ten months after it issued its opinion on Hill's *Atkins* claim. The Eleventh District Court of Appeals remanded the case to the trial court for the competency hearing after Hill's counsel filed a motion to withdraw from the case because Hill no longer wished to pursue his appeal and wanted them to withdraw as his counsel. (Supp. App., Disc 1, Tr.,

1926-28.) After hearing testimony from a psychologist, the court found that Hill was competent to make decisions about his appeal. (*Id.* at 1954.) There is no evidence that the [*167] outcome would have been any different if such a hearing had taken place in the proceeding two years, before or during Hill's *Atkins* hearing. This sub-claim fails as speculative.

(3) failure to object to Teeples videotaping Hill

For this sub-claim, Hill argues that his *Atkins* counsel should have objected when Detective Teeples videotaped Hill's testing related to his *Atkins* hearing. Teeples also was present during Hill's final interrogation by police at which he confessed to being present at the crime, and Hill believed Teeples was part of a conspiracy to falsely hold him responsible for the murder. Hill claims Teeples' presence during the testing contributed to his difficulty with the testing. (ECF No. 94, 50.)

This sub-claim also lacks merit. Hill has offered no evidence to show when, if ever, his counsel was aware of this issue, and whether or not he could have objected in time. Moreover, it is pure speculation to suggest that Hill's performance on the test would have been different had Teeples not been videotaping it.

(4) being "forced to" proceed with representation

Hill argues that his *Atkins* counsel should not have allowed himself to be "forced to" continue to represent him when their [*168] relationship had deteriorated. (*Id.* at 63-80.) As Hill acknowledges, his

counsel twice filed motions to withdraw from the case, both of which were denied. (*Id.* at 65.) There was nothing more counsel could do. This claim is meritless.[31]

(5) failure to object to "the fanatical prosecution"

Hill finally claims that his counsel was ineffective because he did not object to "the fanatical prosecution." (ECF No. 94, 80.) To the contrary, the Court notes that, after reviewing the entire record, it is apparent that Hill's [*169] counsel represented him skillfully and ardently. Hill offers no evidence to support this claim, and it fails.

Accordingly, Hill's claim for ineffective assistance of *Atkins* counsel is denied.

C. Third Ground for Relief: Actual Innocence

Hill claims for his third ground for relief that he is actually innocent of the death penalty because he is intellectually disabled. Respondent counters that this claim is a "reiteration" of his *Atkins* claim "and fails for the same reason." (ECF No. 98, 6.)

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[31] Hill also appears to frame this sub-claim as an error of the trial court in denying the motions to withdraw. He fails to develop that argument, however, and it is waived. *See United States v. Crosgrove*, 637 F.3d 646, 663 (6th Cir. 2011) ("Because there is no developed argumentation in these claims, the panel declines to address Cosgrove's general assertions of misconduct in witness questioning and closing statements."); *United States v. Hall*, 549 F.3d 1033, 1042 (6th Cir. 2008) ("'[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'") (quoting *United States v. Johnson*, 440 F.3d 832, 846 (6th Cir. 2006)).

In *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), the Supreme Court explained that "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 404. The Court stated in dicta, however, that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional" regardless of whether any constitutional violation occurred during trial. *Id.* at 417.

The Supreme Court has never applied such a claim, however, and recently declined to resolve whether a "free-standing" actual innocence [*170] claim is cognizable on federal habeas review. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931, 185 L. Ed. 2d 1019 (2013). The Sixth Circuit also has held that such a claim is not a valid ground for habeas relief. *See, e.g., Cress v. Palmer*, 484 F.3d 844, 854-55 (6th Cir. 2007); *Thomas v. Perry*, 553 Fed. Appx. 485, 2014 WL 128153, at *2 (6th Cir. 2014). Moreover, the *Herrera* Court emphasized that "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Herrera*, 506 U.S. at 417; *see also House v. Bell*, 547 U.S. 518, 520, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006).

Because this claim has not yet been recognized by the Supreme Court or the Sixth Circuit, relief on this claim is denied.

VI. CERTIFICATE OF APPEALABILITY ANALYSIS

This Court must now determine whether to grant a Certificate of Appealability ("COA") for any of Hill's grounds for relief. The Sixth Circuit has determined that neither a blanket grant nor a blanket denial of a COA is an appropriate means by which to conclude a capital habeas case as it "undermine[s] the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims [*171] that have little or no viability." *Porterfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001); *see also Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001) (remanding motion for certificate of appealability for district court's analysis of claims). Thus, in concluding this Opinion, this Court now must consider whether to grant a COA as to any of the claims Hill presented in his Amended Petition pursuant to 28 U.S.C. § 2253.

That statute states in relevant part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .
>
> (2) A certificate of appealability may issue under paragraph (12) only if the applicant has make a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253. This language is identical to the requirements set forth in the pre-AEDPA statutes, requiring the habeas petitioner to obtain a Certificate of Probable Cause. The sole difference between the pre- and post-AEDPA statutes is that the petitioner must now demonstrate he was denied a *constitutional* [*172] right, rather than the federal right that was required prior to AEDPA's enactment.

The United States Supreme Court interpreted the significance of the revision between the pre- and post-AEDPA versions of that statute in *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). In that case, the Court held that § 2253 was a codification of the standard it set forth in *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983), but for the substitution of the word "constitutional" for "federal" in the statute. *Id.* at 483. Thus, the Court determined,

> [t]o obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further."

Id. at 483-04 (quoting *Barefoot*, 463 U.S. at 893 n.4).

The Court went on the distinguish the analysis a habeas court must perform depending upon its finding concerning the defaulted status of the claim. If the claim is not procedurally defaulted, then a habeas court need only [*173] determine whether

reasonable jurists would find the district court's decision "debatable or wrong." *Id.* at 484. A more complicated analysis is required, however, when assessing whether to grant a COA for a claim the district court has determined is procedurally defaulted. In those instances, the Court opined, a COA should only issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

After taking the above standards into consideration, the Court finds that it will issue a COA for Hill's *Atkins* claim, his first ground for relief. Reasonable jurists could debate this Court's conclusion on the merits of this claim. The Court will not issue a COA for Hill's second ground for relief (ineffective assistance of *Atkins* counsel) or third ground for relief (actual innocence), as neither is a cognizable ground for federal habeas relief. No jurist of reason would debate the Court's conclusions on these claims.

VII. CONCLUSION

Accordingly, this Court finds that Petitioner Danny Lee Hill's Amended Petition [*174] for Writ of Habeas Corpus is denied. The Court further certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal

from this decision as to Hill's first ground for relief can be taken in good faith.

IT IS SO ORDERED.

/s/ John R. Adams
JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

June 25, 2014

APPENDIX E

Case No. 4:96cv0795

UNITED STATES DISTRICT COURT FOR THE
NOTHERN DISTRICT OF OHIO,
EASTERN DIVISION

DANNY LEE HILL,
Petitioner,

v.

CARL ANDERSON, WARDEN,
Respondent,

Decided and Filed: September 29, 1999

JUDGES: Paul R. Matia, Chief Judge,
United States District Court.

COUNSEL: For Danny Hill, Petitioner: Cynthia Ann Yost, LEAD ATTORNEY, Ohio Legal Rights Service, Columbus, OH.

For Danny Hill, Petitioner: George C. Pappas, Jr., Patricia A. Millhoff, LEAD ATTORNEYS, Akron, OH.

For Carl Anderson, Respondent: Charles L. Wille, LEAD ATTORNEY, Office of the Attorney General, Columbus, OH; Matthew J. Lampke, LEAD ATTORNEY, Office of the Attorney General, Columbus, OH.

OPINION BY: John Paul R. Matia

OPINION

MEMORANDUM OF OPINION AND ORDER

Danny Lee Hill has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Oral argument was held on October 8, 1997. In making its decision, in addition to oral arguments, this Court has considered the respondent's return of writ. (Doc. 22), and petitioner's proposed findings of fact and conclusions of law (doc. 46). For the following reasons, the petition for writ of habeas corpus is denied.

PROCEDURAL HISTORY

On September 17, 1985, Hill was indicted by the Trumbull County Grand Jury on counts of aggravated [*2] murder, (R.C. § 2903.01(B)), with specifications of kidnaping (R.C. § 2905.01), rape (R.C. § 2907.02), aggravated arson (R.C. § 2909.02) and aggravated robbery (R.C. § 2911.01) as well as separate counts for each of the four specifications and one count of felonious sexual penetration (R.C. § 2907.12(A)(1)-(3), for a total of six counts. He elected to have his case heard by a three judge panel who found him guilty of all counts with the exception of the aggravated robbery count. After a mitigation hearing the three judge panel sentenced him to death on February 28, 1986, for the aggravated murder with specifications, ten to twenty-five years imprisonment for kidnaping and aggravated arson, and life imprisonment for rape and felonious sexual penetration.

On February 14, 1986, and April 4, 1986, Hill filed motions for new trial as to the guilt phase of the proceedings. Both motions were denied.

Hill appealed his convictions and sentences to the Eleventh District Court of Appeals on April 25, 1986. On June 9, 1986, he filed a second notice of appeal pertaining to the trial court's denial of his motions for new trial. Hill raised the following nineteen assignments of error on direct [*3] appeal.

FIRST ASSIGNMENT OF ERROR.

The trial court erred in admitting into evidence statements of the Appellant.

Issues Presented for Review and Argument.

1) An accused's Sixth Amendment right to counsel is violated when he is deprived of counsel for custodial interrogation when he does not knowingly, intelligently and voluntarily relinquish a known right due to the misconduct of law enforcement authorities and the defendant being essentially illiterate and being mentally retarded.

2) An accused's statements are not voluntary when such statements were coerced by the psychological [sic] tactics of law enforcement officers on a retarded individual who was essentially illiterate and the admission of such statements violates due process.

3) An accused's statements are not admissible unless the State establishes that the procedural safeguards contained in the Miranda warnings were properly given or knowingly, intelligently and voluntarily waived.

4) An accused's Fourth and Fifth Amendment rights are violated when an accused is seized from his home through the use of psychological ploys by law enforcement officers upon an accused who is mentally retarded [*4] and essentially illiterate.

5) An accused is denied his right to due process pursuant to the Fourteenth Amendment when he is denied his statutory right to counsel pursuant to R.C. 120.16, 2834.14, [sic] and 2935.20.

6) Noncompliance with R.C. 2935.05 results in an illegal arrest, and any statements and/or evidence derived therefrom should be suppressed.

7) When statements are made by an accused to law enforcement officers under the impression of receiving leniency or some other benefit, then those statements are inadmissible in any later trial.

SECOND ASSIGNMENT OF ERROR.

The trial court erred in the admission of "other acts" testimony.

Issues Presented for Review and Argument

The admission of other crimes, wrongs, acts or acts [sic] into evidence by the trial court violated R.C. 2945.59, Evid. R. 404(n) and the due process clause of the Fourteenth Amendment to the United States Constitution to the prejudice of Appellant thus requiring reversal.

THIRD ASSIGNMENT OF ERROR.

The trial court improperly admitted certain evidence.

Issues Presented for Review and Argument

A trial court must exclude evidence that is either not [*5] relative [sic], or its relevance is outweighed by its prejudicial effect or such evidence is solely introduced to influence the court. The effect of the erroneous evidentiary rulings was the denial of Appellant's rights to due process and fair and impartial trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

FOURTH ASSIGNMENT OF ERROR.

The trial court erred in admitting Exhibit 47 a "stick".

Issues Presented for Review and Argument

It is error for a trial court to draw an inference from another inference because the foundation of the second inference is so insecure that reliance upon it would result in an inferred fact which is merely speculative in nature.

FIFTH ASSIGNMENT OF ERROR.

The right to confront witnesses was violated.

Issues Presented for Review and Argument

An accused's right to confrontation is violated when a Prosecutor consults with an important witness while that witness was subject to recall and was a surprise witness of which defense counsel had no prior knowledge.

SIXTH ASSIGNMENT OF ERROR.

The trial court erred [*6] in denying the Appellant's motion to include licensed drivers in the pool of licensed drivers. [sic]

Issues Presented for Review and Argument

It is a denial of an accused's right to a fair cross-section of the community by denying a request for inclusion in that [sic] pool of prospective jurors licensed drivers pursuant to R.C. 2323.08(B) in violation of the sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Ohio Constitution.

SEVENTH ASSIGNMENT OF ERROR.

The trial court erred in allowing the Appellant to waive his right to jury in writing pursuant to Crim. R. 23.

Issues Presented for Review and Argument

It is a violation of an accused's [sic] right to jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 when the court does not determine on the record, specifically addressing an accused, whether he has knowingly, intelligently, and voluntarily waived his right to a jury trial.

EIGHTH ASSIGNMENT OF ERROR.

The trial court erred in denying the Appellant funds to employ an expert witness for a motion hearing.

Issues [*7] Presented for Review and Argument

It is reversible error for a trial court to deny an accused funds necessary to employ an expert for

purposes of a motion for closure of pre-trial hearings that was necessary to preserve a fair and impartial jury pursuant to the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article II, Section 26.

NINTH ASSIGNMENT OF ERROR.

The admission of Exhibit 3 (a photograph of Raymond Fife) was error.

Issues Presented for Review and Argument

The trial court erred and abused its discretion in admitting in [sic] a pre-death photograph of the victim. This error violated Appellant's rights under Evid. R. 404, the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16 of the Ohio Constitution.

TENTH ASSIGNMENT OF ERROR.

The Appellee did not give the Appellant complete discovery.

Issues Presented for Review and Argument

When the state repeatedly fails to comply with Crim. R. 16, it is violating an accused's right to a fair trial and the effective assistance of counsel.

ELEVENTH ASSIGNMENT OF ERROR.

Admission of certain photographs was [*8] an abuse of discretion.

Issues Presented for Review and Argument

It is an abuse of discretion for a trial court to allow into evidence photographs of the victim because such photographs were highly prejudicial, gross, and unnecessary and which lacked probative

value in determining the issues involved. Their admission violated the Appellant's [sic] Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

TWELFTH ASSIGNMENT OF ERROR.

The state made improper closing arguments at both the guilt and mitigation phases of this case.

Issues Presented for Review and Argument

Prosecutorial misconduct during both the guilt and mitigation phase closing arguments denied Appellant his right to a fair trial and an impartial fact-finder as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

THIRTEENTH ASSIGNMENT OF ERROR.

The Appellant was denied the effective assistance of counsel.

Issues Presented for Review and Argument

When the issue of effective assistance of counsel [*9] is raised that involves matters both within the record and outside the record the proper avenue for reviewing that issue should be on post-conviction relief even if counsel on appeal is not trial counsel. The Appellant's right to effective assistance of counsel was violated pursuant to the Sixth and Fourteenth Amendment rights to [sic] the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution.

FOURTEENTH ASSIGNMENT OF ERROR.

It was error for the trial court to sentence Appellant on the kidnaping charge and the kidnaping specification.

Issues Presented for Review and Argument

The trial court erred in entering a judgment of conviction for kidnaping and other felonies where convictions on both offenses are contrary to 2941.25. Secondly, where an underlying felony count which is also used as a specification for aggravated murder merges then it cannot be considered as an additional specification for sentencing purposes.

FIFTEENTH ASSIGNMENT OF ERROR.

The motion for new trial should have been granted.

Issues Presented for Review and Argument

A motion for new trial should note [sic] be denied without a full hearing [*10] when made pursuant to Crim. R. 33. A denial of such hearing and the motion violates an accused's Fifth, Sixth and Fourteenth Amendment rights to [sic] the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution and Crim. R. 33.

SIXTEENTH ASSIGNMENT OF ERROR.

The trial court was improperly prevented by [sic] deciding whether death was the appropriate punishment.

Issues Presented for Review and Argument

Ohio's mandatory sentencing scheme prevented the panel of three judges from deciding whether death was the appropriate punishment in violation of

Appellant's rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Ohio Constitution.

SEVENTEENTH ASSIGNMENT OF ERROR.

The trial court failed to consider all of the evidence in support of mitigating a death sentence.

Issues Presented for Review and Argument

A sentence of death must be reversed when a trial court fails to consider all the evidence presented in mitigation. Such a failure violates Appellant's constitutional rights under *Lockett v. Ohio* and *Eddings v. Oklahoma.*

[*11] EIGHTEENTH ASSIGNMENT OF ERROR.

A sentence of death is unconstitutional.

Issues Presented for Review and Argument

1. The Ohio death penalty scheme, found in Ohio Revised Code Sections 2903.01 and 2929.02 *et. seq.*,,, violates the prohibition against cruel and unusual punishment and equal protection guarantees contained in the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 9 of the Ohio Constitution.

A. The imposition of the death penalty under Ohio's statutory authority is degrading to the dignity of human beings and cannot be exercised within the limits of contemporary civilized standards.

B. The death penalty is arbitrarily, freakishly, and discriminatorily inflicted, constituting cruel and unusual punishment and a denial of

equal protection under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 9 of the Ohio Constitution.

C. The arbitrary and capricious application of the death penalty under the Ohio statutory scheme persists due to the uncontrolled discretion of the prosecutor.

2. The Ohio death penalty scheme, [*12] as authorized by R.C. 2903.01 and 2929.02, *et seq.*, deprives capitally charged defendants of their lives without due process of law in violation of the guarantees of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

A. Where the substantive due process requirements that the least restrictive means of serving a compelling state interest, when fundamental rights are involved, are not met, the death penalty cannot be constitutionally inflicted.

B. The death penalty is neither the least restrictive means of punishment nor an effective means of deterrence.

C. The societal interest of incarceration of the offender can be effectively served by means less restrictive than the death penalty.

D. If retribution or revenge is to be considered, it can be satisfied by less onerous means than death.

3. The Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16

of the Ohio Constitution guarantee fairness in judicial proceedings by requiring procedural due process, the violation of which will result in unequal protection of law, contrary to the guarantees in [*13] the Fourteenth Amendment and Article I, Section 2, and the imposition of cruel and unusual punishment, contrary to the Eighth Amendment and Article I, Section 9 of the Ohio Constitution

A. The Ohio death penalty scheme permits imposition of the death penalty on a less than adequate showing of culpability by failing to require a conscious desire to kill, premeditation, or deliberation as the culpable mental state.

B. The statutes fail to require a stringent standard of proof as to guilt and conviction before the death penalty may be imposed.

C. The Ohio death penalty statutes fail to require that the jury consider as a mitigating factor pursuant to R.C. 2929.04(B) that the evidence fails to preclude doubt as to the defendant's guilt. The fact that evidence does not foreclose doubt as to guilt must be considered as a relevant mitigating factor under R.C. 2929.04(B).

D. The statutes fail to require the state to prove the absence of any mitigating factors and that death is the only appropriate penalty before the death sentence may be constitutionally imposed.

E. The Ohio death penalty statute impermissibly mandates imposition of the death penalty upon proof [*14] of an

aggravating circumstance "outweighing" any evidence in mitigation.

F. R.C. 2903.01, 2929.022, 2929.03, 2929.04 and 2929.05 violate the Eighth Amendment prohibition against cruel and unusual punishment and the Fourteenth Amendment due process and equal protection clauses of the United States Constitution and Article I, Sections 9 and 16 of the Ohio Constitution by requiring proof of aggravating circumstances in the guilt-determining state of a capital trial.

G. R.C. 2929.021, 2929.03 and 2929.05 fail to assure adequate appellate analysis of excessiveness and disproportionality of death sentences.

4. By providing for a sentencing hearing before the same jury which convicted the Appellant, the statutes violate the Appellant's right to effective assistance of counsel, to an impartial jury, and to a fair hearing the United States Constitution and Article I, Sections 5, 10 and 16 of the Ohio Constitution.

5. Sections 2929.03 and 2929.04 of the Ohio Revised Code violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; the cruel and unusual punishment clauses of the Eighth Amendment and Article I, Section [*15] 9 of the Ohio Constitution; and the double jeopardy provisions of the Fifth Amendment and Article I, Section 10, of the Ohio Constitution.

6. The death penalty authorized by sections 2929.02, 2929.022, 2929.03 and 2929.04 of the

Revised Code of Ohio violates the cruel and unusual punishment provisions and due process clauses of the state and federal constitutions. The aggravating circumstance of aggravated murder in the course of kidnaping in R.C. 2929.04(A) is over broad and fails to reasonably justify the imposition of a more severe sentence. Eighth and Fourteenth Amendments, United States Constitution and Article I, Sections 9, 10 and 16 of the Ohio Constitution.

NINETEENTH ASSIGNMENT OF ERROR.

This Court cannot find that after reviewing all of the factors of R.C. 2929.05(A) that death was the appropriate sentence for Danny Lee Hill.

Issues Presented for Review and Argument

This Court cannot find, pursuant to R.C. 2929.05(A), that

(1) the judgment of guilt of aggravated murder and the specifications was [sic] supported by sufficient evidence,

(2) that the aggravating circumstances outweigh the mitigating factors in the case,

(3) that the [*16] sentence of death is appropriate,

(4) that the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, and

(5) that the trial court properly weighed the aggravating circumstances and mitigating factors. Appellant's death sentence was imposed in violation of his rights to due process and freedom from cruel and unusual punishment. Fifth, Eighth, and Fourteenth Amendments to the United States

Constitution; Article I, Sections 9 and 16, Ohio Constitution.

The court of appeals affirmed the decision of the trial court on November 2, 1989. Thirty days later, Hill filed a notice of appeal of the court of appeals decision in the Supreme Court of Oho. On February 14, 1990, the Supreme Court of Ohio stayed Hill's execution pending the resolution of his appeal. Hill raised twenty-five propositions of law. The propositions of law are as follows.

PROPOSITION OF LAW NUMBER 1

An accused's right to counsel is violated when he is deprived of counsel for custodial interrogation when he does not knowingly, intelligently and voluntarily relinquish a known right due to the misconduct of law enforcement authorities and the accused being mentally [*17] retarded in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the equivalent provisions of the Ohio Constitutions [sic].

PROPOSITION OF LAW NUMBER 2

An accused's statements are not voluntary when such statements were coerced by the psychological tactics of law enforcement officers on a retarded individual who was essentially illiterate and the admission of such statements violates the due process clauses of both the Ohio and United States Constitutions.

PROPOSITION OF LAW NUMBER 3

An accused's statements are not admissible unless the state establishes that the procedural safeguards continued [sic] in the Miranda warnings

were properly given or knowingly, intelligently, and voluntarily waived as provided under the Fifth and Fourteenth Amendments of the United States Constitution and the Equivalent portion of the Ohio Constitution.

PROPOSITION OF LAW NUMBER 4

An accused's Fourth and Fourteenth Amendment rights under the United States Constitution and the equivalent provisions under the Ohio Constitution are violated when an accused is seized from his home through the use of psychological ploys by law enforcement [*18] officers upon an accused who is mentally retarded and essentially illiterate.

PROPOSITION OF LAW NUMBER 5

An accused is denied his right to due process under both the Ohio and United States Constitutions when he is denied his statutory right to counsel pursuant to R.C. 120.16, 2934.14 and 2935.20.

PROPOSITION OF LAW NUMBER 6

Noncompliance with R.C. 2935.05 results in an illegal arrest, and any statements and/or evidence derived therefrom should be suppressed.

PROPOSITION OF LAW NUMBER 7

When statements are made by an accused to law enforcement officers under the impression of receiving leniency or some other benefit, then those statements are inadmissible in any later trial.

PROPOSITION OF LAW NUMBER 8

The admission of other crimes, wrongs, or acts into evidence by the trial court violated R.C. 2945.59, Evid. R. 404(B) and the due process clause of the

Fourteenth Amendment to the U.S. Constitution to the prejudice of appellant thus requiring reversal.

PROPOSITION OF LAW NUMBER 9

A trial court must exclude evidence that is either not relative [sic] or its relevance is outweighed by its prejudicial effect or such evidence is [*19] solely introduced to influence the court. The effect of the erroneous evidentiary rulings was the denial of appellant's right to due process and fair and impartial trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections Ten and Sixteen of the Ohio Constitution.

PROPOSITION OF LAW NUMBER 10

An inference of fact cannot be predicated upon another inference, but must be predicated upon a fact supported by law. *Sobolovitz v. Lubric Ohio Co.*, 107 Ohio St. 204, 1 Ohio Law Abs. 261, 140 N.E. 634 (1923). It is error for a trial court to draw an inference from another inference because the foundation of the second inference is so insecure that reliance upon it would result in an inferred fact which is merely speculative in nature.

PROPOSITION OF LAW NUMBER 11

An accused's right to confrontation is violated when a prosecutor consults with an important witness while that witness was subject to recall and was a surprise witness of which defense counsel had no prior knowledge.

PROPOSITION OF LAW NUMBER 12

It is a denial of an accused's right to a fair cross-section of the community to deny a request for

inclusion in the pool [*20] of prospective jurors licensed drivers pursuant to R.C. 2313.08(B) in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section Ten of the Ohio Constitution.

PROPOSITION OF LAW NUMBER 13

It is a violation of an accused's right to jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section Ten of the Ohio Constitution when the court does not determine on the record, specifically addressing the accused, whether he has knowingly, intelligently, and voluntarily waived his right to a jury trial.

PROPOSITION OF LAW NUMBER 14

It is reversible error for a trial court to deny an accused funds necessary to employ an expert for purposes of a motion for closure of pre-trial hearing that was necessary to preserve a fair and impartial jury pursuant to the Fifth, Sixth and Fourteenth Amendments, of the United States Constitution and Article I, Sections 2, 10 and 16 and Article II, Section 26.

PROPOSITION OF LAW NUMBER 15

A trial court errs and abuses its discretion in admitting a pre-death photograph of the victim. Such error violates appellant's rights under [*21] Evid. R. 404, the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections Ten and Sixteen of the Ohio Constitution.

PROPOSITION OF LAW NUMBER 16

When the state repeatedly fails to comply with Crim. R. 16, it is violating an accused's right to a fair trial and to the effective assistance of counsel.

PROPOSITION OF LAW NUMBER 17

It is an abuse of discretion for a trial court to allow into evidence photographs of the victim because such photographs were highly prejudicial, gross, and unnecessary and which lacked probative value in determining the issues involved. Their admission violated the appellant's [sic] Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections Ten and Sixteen of the Ohio Constitution.

PROPOSITION OF LAW NUMBER 18

Prosecutorial misconduct during both the guilt and mitigation phase of closing argument deny [sic] an accused his right to a fair trial and an impartial fact-finder as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections Ten and Sixteen of the Ohio Constitution.

PROPOSITION OF [*22] LAW NUMBER 19

When the issue of effective assistance of counsel is raised that involves matter both within the record and outside the record the proper avenue for reviewing that issue should be on post-conviction relief even if counsel on appeal is not trial counsel. The accused's right to effective assistance of counsel was violated pursuant to the Sixth and Fourteenth Amendment rights to [sic] the United States

Constitution and Article I, Sections Ten and Sixteen of the Ohio Constitution.

PROPOSITION OF LAW NUMBER 20

The trial court erred in entering a judgment of conviction for kidnaping and the other felonies where convictions on both offenses are contrary to R.C. 2941.25. Secondly, where an underlying felony count which is also used as a specification for aggravated murder merges, then it cannot be considered as an additional specification for sentencing purposes.

PROPOSITION OF LAW NUMBER 21

A motion for new trial should not be denied without a full hearing when made pursuant to Crim. R. 33. A denial of such a hearing and the motion violates an accused's Fifth, Sixth and Fourteenth Amendment rights to [sic] the United States Constitution and [*23] Article I, Sections Ten and Sixteen of the Ohio Constitution and Crim. R. 33.

PROPOSITION OF LAW NUMBER 22

Ohio's mandatory sentencing scheme prevented the panel of three judges from deciding whether death was the appropriate punishment in violation of appellant's rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections Nine and Sixteen of the Ohio Constitution.

PROPOSITION OF LAW NUMBER 23

The failure to consider all of the evidence in support of mitigating a death sentence violates R.C. 2929.03(F) and the Eighth and Fourteenth Amendments to the United States Constitution.

PROPOSITION OF LAW NUMBER 24

The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution establish the requirements for a valid death penalty scheme. Ohio Revised Code Sections 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.04 and 2929.05, Ohio's statutory provisions governing the imposition of the death penalty, do not meet the prescribed constitutional requirements and are unconstitutional, both [*24] on their face and as applied to appellant.

PROPOSITION OF LAW NUMBER 25

This Court cannot find, pursuant to R.C. 2929.05(A), that (1) the judgment of guilt of aggravated murder and the specifications was [sic] supported by sufficient evidence; (2) that the aggravating circumstances outweigh the mitigating factors in the case; (3) that the sentence of death is appropriate; (4) that the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases; and (5) that the trial and appellate courts properly weighed the aggravating circumstances and mitigating factors. Appellant's death sentence was imposed in violation of his rights to due process and freedom from cruel and unusual punishment as encompassed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections Nine and Sixteen of the Ohio Constitution.

On August 12, 1992, the Supreme Court of Ohio affirmed the decision of the Eleventh District Court of Appeals. Hill moved for a rehearing on August 12, 1992, which was denied on September 30, 1992.

On October 22, 1992, the Supreme Court of Ohio granted Hill's motion for an indefinite stay of [*25] execution, pending disposition of his petition for *writ of certiorari* in the United States Supreme Court. Hill filed his petition for *writ of certiorari* in the United States Supreme Court on December 29, 1992. It was denied March 29, 1993, and on April 8, 1993, the Supreme Court of Ohio terminated his stay of execution.

Subsequently, Hill filed another motion for stay of execution in the Supreme Court of Ohio which the Court granted on June 21, 1993, pending the exhaustion of state post-conviction proceedings. The trial court received Hill's motion for post-conviction relief on December 21, 1993, which included fifteen claims for relief. The claims for relief are as follows:

FIRST CLAIM FOR RELIEF

Petitioner Hill's convictions and sentences are void and/or voidable because the three judge panel failed to unanimously agree on the record as to the specifications to the aggravated murder charge as they relate to whether he committed them [sic] offenses as a principal or with prior calculation and design.

SECOND CLAIM FOR RELIEF

Petitioner Hill's convictions and sentences are void and/or voidable because the State of Ohio failed to provide full and complete [*26] discovery of evidence which was material to the guilt or innocence of Petitioner, which was properly demanded prior to trial.

THIRD CLAIM FOR RELIEF

Petitioner Hill's death sentence is void and/or voidable because the three-judge panel considered non-statutory aggravating factors, as evidenced by their decision and findings regarding sentencing at the penalty phase. The trial court held, considered and weighed against the mitigating factors the following non-statutory aggravating circumstances:

"A) The manner in which the rape was committed, particularly:

1. The amount of force;

2. The relative size of the defendant and the victim;

3. The relative age of the defendant and the victim;

4. The biting of the penis;

5. The pulling on the genitals;

6. The length of the time of the sexual abuse;

7. The concurrent use of a sharp instrument long enough to rupture the victim's urinary bladder;

B) The manner in which the kidnaping was conducted, particularly;

1. Slamming the victim upon the ground and on the bicycle pedal;

2. The kicking of the victim;

3. The severe head injury inflicted;

4. The multiple blows to [*27] the victim's body;

5. The removal of the victim while he was still alive to a place where possible medical aid would likely be delayed.

C) The strangulation with the victim's own clothing and the attendant torture which must have been occasioned by being pulled off the ground and held in the air;

D) Burning of the victim's face and body which could only have been either a futile attempt to conceal his identity or simply a vicious attempt to inflict more pain;

E) The callous denial of the victim's request for help and to get his mother;

F) Total lack of remorse indicated by defendant's appearance at the police station after the murder inquiring about a reward;

G) The totality of the circumstances indicating that the victim was tortured over a long period of time evidencing a vicious, perverted, animalistic state of mind.

Opinion of March 5, 1986, at 1-2. Critical to the Court's finding was that the aggravating factors were not the specifications set forth in the statute (R.C. 2929.04(A)(7), but were in fact based upon the improper arguments of the prosecution. See Fourth and Ninth Claim for Relief.

FOURTH CLAIM FOR RELIEF

Petitioner [*28] Hill's death sentence is void and/or voidable because the three-judge panel failed to consider all statutory mitigating factors on which evidence was presented. Further the panel discounted the mitigation evidence produced by the

defendant and used that evidence as further non-statutory circumstances ...

FIFTH CLAIM FOR RELIEF

Petitioner Hill's convictions and sentences are void and/or voidable because the incredible media attention by the print and television media prejudiced the minds of the witnesses, the prosecution, and the three-judge panel. There was an allegation that there would be race riots if Danny Hill were not convicted and sentenced to death. See Affidavit of Vera Williams at paragraph 41. The courtroom was often so filled with spectators that the judges made special provisions in procedure for avoiding disturbances. Stephen Melius even approached the prosecution after having followed the trial on television and newspapers, stating, "I've been reading the papers everyday since this Court hearing started." (Tr. 1033). Prosecutor Kontos even began his closing argument by stating,

> "Mr. Lewis, Mr. Kenny, the defendant, Mr. Watkins, distinguished Judges [*29] of this Court. This has been a long, difficulty [sic], and trying case for everybody. I'll try to be as short as I can. *The crimes perpetrated against the victim in this case and what has happened to this particular young man shocked and stunned the community to its foundation."* Tr. 1246 (emphasis added).

SIXTH CLAIM FOR RELIEF

Petitioner Hill's convictions and sentences are void and/or voidable because the Ohio Death Penalty Scheme, on its face and as applied in this case, violates the United States and Ohio Constitutions.

The Ohio Death Penalty Statutory Scheme is constitutionally deficient in the following manner:

A) Prosecutors have unregulated discretion in determining who will be charged with the death penalty.

B) The statutory scheme fails to require premeditation or deliberation.

C) The statutory scheme fails to establish a standard for determining the existence of mitigating factors.

D) The statutory scheme fails to establish a standard by which to balance the mitigating factors against the aggravated [sic] circumstances.

E) The statutory scheme permits the jury to consider aggravating circumstances at the trial phase. [*30]

(F) The statutory scheme does not give the sentencer the option to impose a life sentence when the sentencer determines that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

G) The statutory scheme permits the same panel to decide both guilt and sentence.

H) The statutory scheme encourages capitally-charged individuals to plead guilty. Crim. R. 11(C)(3).

I) The statutory scheme creates a mandatory death penalty.

J) The statutory scheme permits the State to argue first and last in mitigation.

K) The statutory scheme permits the death penalty to be applied in an arbitrary, capricious and discriminatory manner.

SEVENTH CLAIM FOR RELIEF

Petitioner Hill's convictions and sentences are void and/or voidable because Hill was incompetent to understand and waive his Miranda rights, incompetent to understand and waive his constitutional rights to counsel, to jury trial, and to stand trial. Affidavit of Kathleen Burch, Psy.D., R.N. Ms. Burch has tested and examined Danny Hill and has concluded that "the behavioral observations enumerated ... cast some doubt on his competency to cooperate with his attorneys in [*31] his defense" and that his psychological disturbance "might serve to impair his competency." See, also, Affidavit of Caroline Everington, Ph.D, who interviewed and extensively tested Hill. Dr. Everington concluded that, "it is my opinion that it is highly likely that he was not fit to stand trial at that time." Dr. Everington also has concluded that, "it is probable that he did not understand the Miranda warning and, thus, the implications of the information he gave to the police." See, also, Affidavit of Jane Core.

EIGHTH CLAIM FOR RELIEF

Petitioner Hill's convictions and sentences are void and/or voidable because his trial counsel was ineffective in violation of the guarantees of the Ohio and United States Constitutions. Gerald Simmons is an expert criminal trial attorney, as shown by his attached affidavit. The trial work of counsel in the present case is ineffective in that it fails to meet the minimum standard of effectiveness, some areas of

which are set forth in Mr. Simmons' affidavit, as follows:

> a) Failure to fully and adequately investigate his client's competency: counsel failed to determine, and to present adequate evidence on, his client's competency [*32] to understand and waive his Miranda Rights [sic], to understand and waive his right to trial by jury, to understand and waive his right to testify in the guilt phase and mitigation phase, to a trial by jury, and his competency to stand trial and assist in his defense.
>
> b) Failure to fully investigate his client's background: counsel failed to discover or fully investigate Danny Lee Hill's mental, emotional, and intellectual levels, and the associated degree of functional deficiencies.
>
> c) Failure to Make [sic] a Motion for Acquittal pursuant to Criminal Rule 29.
>
> d) Failure to investigate the composition of the grand jury and to obtain transcripts as [sic] after individuals testified.
>
> e) Failure to attempt to seat a jury prior to waiving his client's jury trial right; failure to make an agreement on a life recommendation prior to accepting a three-judge panel.
>
> f) Failure to adequately prepare for Dr. Levine's testimony, in that he was surprised by the Dr.'s testimony.
>
> g) Failure to enforce separation of witnesses or to move to strike testimony of persons improperly contaminated by discussions with other witnesses during the trial.

h) Failure to [*33] make an opening statement at the mitigation hearing or to adequately prepare for the hearing.

i) Failure to object to improper prosecutorial statements. See Ninth Cause of Action.

j) Failure to develop evidence as to:

A. Petitioner's alcohol and drug use;

B. Petitioner's educational history;

C. Petitioner's lack of a father figure;

D. Petitioner's mother's inability to discipline her children properly;

E. Petitioner's environment; and

F. Petitioner's personality disorder.

k) Failure to obtain the results of the rape kit.

NINTH CAUSE OF ACTION [sic]

Petitioner Hill's convictions and sentences are void and/or voidable because Petitioner Hill's rights were violated due to prosecutorial misconduct during the guilt phase and penalty phase. This misconduct consisted of the following improprieties by the prosecutor in the guilt phase closing argument:

a) Prosecutor Watkins referring to the victim's right to live, to be in court, to be in school, and to celebrate his 13th birthday with his parents. Tr. 1167.

b) Referring to the acts of the Petitioner as having "destroyed and devoured a little boy." Tr. 1167

c) [*34] Basing argument on guilt on the "length of time, the manner of death ... is a new bench mark in human cruelty and murder!" Tr. 1168.

d) Repeating a reference to the Petitioner as an "animal." Tr. 1169.

e) Repeating the charge of "heinous, unbelievable, animalistic behavior. He would make the marquis de Sade proud!" Tr. 1173.

f) He testified to his own beliefs as to the facts, stating "as I view the evidence--as Mr. Kontos and I see the facts to be and the truth to be." Tr. 1175.

g) Arguing facts not in evidence when he stated, "they're in sexual heaven and time has no meaning and dimension." Tr. 1181.

h) Arguing facts not in evidence when he stated, "This boy was running because he was probably screaming in pain from having flammable liquid set afire on his face!" Tr. 1192.

i) Arguing facts not in evidence when he stated, "rain will affect fingerprints as it will affect blood." Tr. 1196.

j) Arguing personal belief when he stated, "I thought his [Gelfius] testimony was much more credible. I don't feel Dehus; it couldn't break down; very unlikely, and I don't think that's the case. I think that the witness from the Arson Lab who deals strictly with [*35] arson is the most credible witness ..." Tr. 1196.

k) On rebuttal, Prosecutor Knotts compounded the attacks on Hill by stating, "This case is about an individual who thrives and relishes on inflicting pain and torture to other human beings.

This individual participated in raping Raymond Fife, and he relished the thought of having him on the ground in pain ... this person sat there and enjoyed this boy struggling to grasp for air, ... So, he sat there and watched that boy burn alive; saw his flesh burning and crackling and enjoyed it." Tr. 1272-73.

l) Referred to Petitioner as having "raped" and having "burned alive" the victim when there was no evidence as to Hill having done so.

m) Argued that, "there was some talk of him being 7 or 9 mentally. I defy this Court to find anybody who is 7 to 9-years old who threatens a female with a knife and tells her to perform oral sex, anal sex, vaginal sex ... The one type of age factor that they didn't discuss, how about his criminal age? This defendant has committed a lifetime of crime in 18 years." Mitigation at 351.

n) Argued that he wanted to call the victim, who, "would have been able to tell all of us ... how he felt when [*36] he was abducted and helpless and felt doomed ... what it felt like to be punched and continually kicked ... to be strangled so severely ... to describe the pain involved and sexual molestation ... the indescribable pain when your flesh is burning ... what it would be like to have a stick rammed up your rectal cavity. But he's not here to testify about that thanks to the defendant." Mitigation at 351-52.

o) Argued that the victim "can't testify about how he misses his family, about how he misses his friends in the Scout group, about how he'd like to be home with his father in the backyard feeding the birds, how he'd like to be able to live and love

and share his love with his family and friends, and he will never be able to do that because of this defendant; this manifestation of evil, this anomaly to mankind, this disgrace to mankind ... Mitigation at 352.

p) Argued that Hill didn't stop before killing the victim because "he enjoyed what he did." Mitigation at 353.

TENTH CLAIM FOR RELIEF

Petitioner Hill's convictions and sentences are void and/or voidable because the trial court failed to ensure a complete record of the proceedings. Hill had filed a motion [*37] on December 13, 1985, to record all proceedings, which motion was granted on December 19, 1985, by order which stated, "granted, with the exception that when it comes to conferences in chambers or bench conferences, that those matters need not be put in the record contemporaneously. However, the defense can put into the record a summary of what has occurred, what was requested, if there was a request, and what the ruling of the Court was." Journal Entry dated December 19, 1985.

ELEVENTH CLAIM FOR RELIEF

Petitioner Hill's convictions and sentences are void and/or voidable because Ohio's reviewing courts failed to fulfill their statutory obligation to meaningfully review the proportionality of Petitioner Hill's death sentence.

TWELFTH CLAIM FOR RELIEF

Petitioner Hill's convictions and sentences are void and/or voidable because the Ohio death penalty

is in violation of international laws and Article VI of the United States Constitution.

THIRTEENTH CLAIM FOR RELIEF

Petitioner Hill's convictions and sentences are void and/or voidable due to the mandatory nature of Ohio's capital statute.

FOURTEENTH CLAIM FOR RELIEF

The Petitioner Hill's convictions [*38] and sentences are void or voidable because the grand jury proceedings were not recorded as required by Crim. R. 22.

FIFTEENTH CLAIM FOR RELIEF

Petitioner Hill's convictions and sentences are void and/or voidable because he was denied a fair and impartial review of his death sentence. *See* Exhibit Y, Petition to Vacate or Set Aside Judgment.

On April 25, 1994, the state moved for judgment in its favor. On the same day, Hill filed a "Motion for Clarification of State's "Motion for Judgment."" Hill then filed a "Motion and Memorandum in Support of Release of Evidence for Independent Laboratory Testing" on June 27, 1994. The trial court denied Hill's motion for clarification on June 24, 1994, and on June 30, 1994, it denied his motion for release of evidence. His post-conviction petition was denied by the trial court on July 18, 1994.

Hill continued the post-conviction proceedings by filing a notice of appeal in the Eleventh District Court of Appeals. Three assignments of error with numerous issues were presented. They are as follows:

> 1. The trial court erred to the prejudice of Petitioner-appellant in overruling his petition as to the claims for relief and [*39] for so ruling without holding an evidentiary hearing.
>
> 2. The trial court erred to the prejudice of Petitioner-appellant in denying petitioner clarification of and subsequently ruling upon the state's "motion for judgment pursuant to R.C. 2953.21(C). See Exhibit MM, Memorandum in Support of Jurisdiction.
>
> 3. The trial court erred to the prejudice of petitioner in denying the petitioner access to physical evidence for testing which evidence was critical to the conviction and the testing of which may reveal [sic] the petitioner's innocence. (Entry of June 30, 1994).

On June 19, 1995, the court of appeals affirmed the trial court's decision denying Hill's petition for post-conviction relief.

The court of appeals' decision was appealed to the Supreme Court of Ohio, notice of appeal having been filed on August 3, 1995. Eighteen propositions of law were presented. The assignments of error submitted to the Supreme Court of Ohio are as follows:

> 1. In a petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the trial court should have granted an evidentiary hearing or the relief demanded where [*40] the petitioner presented evidence that the three judge panel failed to specify in its findings on the specifications that they were unanimously finding that petitioner was the principal

offender, whether they were finding the petitioner committed the aggravated murder with prior calculation and design, or whether they were unable to come to a unanimous finding.

2. In a petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the trial court should have granted an evidentiary hearing or the relief demanded where the petitioner presented evidence that the State of Ohio failed to provide discovery to which the petitioner had been entitled.

3. In a petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 29.53.21, the trial court should have granted an evidentiary hearing or the relief demanded where the three-judge panel considered non-statutory aggravated [sic] factors in sentencing petitioner.

4. In a petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the [*41] trial court should have granted an evidentiary hearing or the relief demanded where the three-judge panel failed to consider all statutory mitigating factors in sentencing.

5. In a petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the trial court should have granted an evidentiary hearing or the relief demanded where the incredible media attention and community feeling prejudiced

the minds of the witnesses, the prosecution, and the three-judge panel.

6. In a petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the trial court should have granted an evidentiary hearing or the relief demanded where the Ohio death penalty scheme, on its face and as applied in this case, violates the United States and Ohio Constitutions.

7. In a petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the trial court should have granted an evidentiary hearing or the relief demanded where there were affidavits of Petitioner's incompetence.

8. In a petition to [*42] vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the trial court should have granted an evidentiary hearing or the relief demanded where an expert criminal defense attorney provided an affidavit as to the prevailing norms for defense attorneys in capital cases and where it was apparent on the face of the record that trial counsel failed to adhere to the norms and thus was ineffective.

9. In a petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the trial court should have granted an evidentiary hearing or the relief demanded where prosecutorial misconduct occurred at the guilt and mitigation phases of the trial and the failure of

the trial court to prohibit the misconduct was clear error.

10. In a petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the trial court should have granted an evidentiary hearing or the relief demanded where the trial court failed to ensure that the proceedings were fully recorded.

11. In a petition to vacate or set aside [*43] judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the trial court should have granted an evidentiary hearing or the relief demanded where Ohio's reviewing courts failed to fulfill their statutory obligation to meaningfully review the proportionality of Hill's death sentence.

12. In a petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the trial court should have granted an evidentiary hearing or the relief demanded where Ohio's death penalty violates international laws and Article VI of the United States Constitution.

13. In a petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the trial court should have granted an evidentiary hearing or the relief demanded where Ohio's capital statute makes death mandatory where aggravating circumstances outweigh mitigating circumstances.

14. In a petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the trial court should have granted an evidentiary hearing [*44] or the relief demanded where the grand jury transcripts were not recorded as required by Crim. R. 22.

15. In a petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the trial court should have granted an evidentiary hearing or the relief demanded where the Petitioner was denied a fair and impartial review of his death sentence.

16. In a petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the trial court should have granted an evidentiary hearing or the relief demanded where all or any of the preceding issues are supported by evidence outside of the record and demonstrate prejudice against the rights of the Petitioner.

17. In a petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Section 2953.21, the trial court should have clarified or dismissed the state's motion for judgment which was not based upon either Civ. R. 12(b)(6) or Civ. R. 56 but was found to be a unique motion based upon R.C. 2953.21(C).

18. The trial court erred to the prejudice of petitioner [*45] in denying the petitioner access to physical evidence for testing which evidence was critical to the conviction and the

testing of which may reveal the petitioner's actual innocence (Entry of June 30, 1994).

Hill's post-conviction appeal was dismissed by the Supreme Court of Ohio on November 15, 1995. On May 22, 1996, the Supreme Court of Ohio vacated Hill's stay of execution.

Hill filled a notice of intent to file a petition for writ of habeas corpus in federal court on April 18, 1996. On July 29, 1996, he filed a motion for stay of execution which was granted for a period of sixty days from the scheduled date of execution. (August 20, 1996 at 12:01 A.M.) Hill obtained an extension of time to file his petition until November 27, 1996. It was finally filed on December 2, 1996.

FACTS

The following facts were set forth by the Supreme Court of Ohio in its decision on Hill's direct appeal of his convictions and sentences. *State v. Hill*, 64 Ohio St.3d 313, 313-17, 1992 Ohio 43, 595 N.E.2d 884 (1992).

On September 10, 1985, at approximately 5:15 p.m., twelve-year-old Raymond Fife left home on his bicycle to visit a friend, Billy Simmons. According to Billy, Raymond would usually get to Billy's [*46] residence by cutting through the wooded fields with bicycle paths located behind the Valu-King store on Palmyra Road I Warren.

Matthew Hunter, a Warren Western Reserve High School student, testified that he went to the Valu-King on the date in question with his brother and sister shortly after 5:00 p.m. Upon reaching the front of the Valu-King, Hunter saw Tim Combs and

defendant-appellant, Danny Lee Hill, walking in the parking lot towards the store. After purchasing some items in the Valu-King, Hunter observed defendant and Combs standing in front of a nearby laundromat. Combs greeted Hunter as he walked by. Hunter also saw Raymond Fife at that time riding his bike into the Valu-King parking lot.

Darren Ball, another student at the high school, testified that he and Troy Cree left football practice at approximately 5:15 p.m. on September 10, and walked down Willow Street to a trail in the field located behind the Valu-King. Ball testified that he and Cree saw Combs on the trail walking in the opposite direction from the Valu-King. Upon reaching the edge of the trail close to the Valu-King, Ball heard a child's scream, "like somebody needed help or something."

Yet another student [*47] from the high school, Donald F. Allgood, testified that he and a friend were walking in the vicinity of the wooded field behind the Valu-King between 5:30 p.m. and 6:00 p.m. on the date in question. Allgood noticed defendant, Combs and two other persons "walking out of the field coming from the Valu-King," and saw defendant throw a stick back into the woods. Allgood also observed Combs pull up the zipper of his blue jeans. Combs "put his head down" when he saw Allgood.

At approximately 5:50 p.m. on the date in question, Simmons called the Fife residence to find out where Raymond was. Simmons then rode his bicycle to the Fife's house around 6:10 p.m. When it was apparent that Raymond Fife's whereabouts were unknown, Simmons continued on to a Boy Scouts

meeting, while members of the Fife family began searching for Raymond.

At approximately 9:30 p.m., Mr. Fife found his son in the wooded field behind the Valu-King. Raymond was naked and appeared to have been severely beaten and burnt in the face. One of the medics on the scene testified that Raymond's groin was swollen and bruised, and that it appeared that his rectum had been torn. Raymond's underwear was found tied around his neck [*48] and appeared to have been lit on fire.

Raymond died in the hospital two days later. The coroner ruled Raymond's death a homicide. The cause of death was found to be cardiorespiratory arrest secondary to asphyxiation, subdural hematoma and multiple trauma. The coroner testified that the victim had been choked and had a hemorrhage in his brain, which normally occurs after trauma or injury to the brain. The coroner also testified that the victim sustained multiple burns, damage to his rectal-bladder area and bite marks on his penis. The doctor who performed the autopsy testified that the victim sustained numerous external injuries and abrasions, and had a ligature mark around his neck. The doctor also noticed profuse bleeding from the victim's rectal area, and testified that the victim had been impaled with an object that had been inserted through the anus, and penetrated through the rectum into the urinary bladder.

On September 12, 1985, defendant went downtown to the Warren Police Station to inquire about a $5,000 reward that was being offered for information concerning the murder of Raymond Fife. Defendant met with Sergeant Thomas W. Stewart of

the Warren Police Department and told [*49] him that he had "just seen Reecie Lowery riding the boy's bike who was beat up." When Stewart asked defendant how he knew the bike he saw was the victim's bike, defendant replied, "I know it is." Defendant then told Stewart, "If you don't go out and get the bike now, maybe [Lowery will] put it back in the field." According to Stewart, the defendant then states that he had seen Lowery and Andre McCain coming through the field at around 1:00 that morning. In the summary of his interview with defendant, Stewart noted that defendant "knew a lot about the bike and about the underwear around the [victim's] neck," Also, when Stewart asked defendant if he knew Tim Combs, defendant replied, "Yeah, I know Tim Combs. *** I ain't seen him since he's been out of the joint. He like boys. He could have done it too."

On September 13, 1985, the day after Stewart's interview with defendant, Sergeant Dennis Steinbeck of the Warren Police Department read Stewart's summary of the interview, and then went to defendant's home and asked him to come to the police station to make a statement. Defendant voluntarily went to the police station with Steinbeck, whereupon defendant was advised of his *Miranda* [*50] rights and signed a waiver of rights form. Defendant made a statement that was transcribed by Steinbeck, but the Sergeant forgot to have defendant sign the statement. Subsequently, Steinbeck discovered that some eyewitnesses had seen defendant at the Valu-King on the day of the murder.

On the following Monday, September 16, Steinbeck went to defendant's house accompanied by

defendant's uncle, Detective Morris Hill of the Warren Police Department. Defendant again went voluntarily to the police station, as did his mother. Defendant was given his *Miranda* rights, which he waived at that time as well. After further questioning by Sergeants Stewart and Steinbeck and Detective Hill, defendant indicated that he wanted to be alone with his uncle, Detective Hill. Several minutes later, defendant stated to Hill that he was "in the field behind Valu-King when the young Fife boy got murdered."

Defendant was given and waived his *Miranda* rights again, and then made two more voluntary statements, one on audiotape and the other on videotape. In both statements, defendant admitted that he was present during the beating and sexual assault of Raymond Fife, but that Combs did everything to the [*51] victim. Defendant stated that he saw Combs knock the victim off his bike, hold the victim in some sort of headlock, and throw him onto the bike several times. Defendant further states that he saw Combs rape the victim anally and kick him in the head. Defendant stated that Combs pulled on the victim's penis to the point where defendant assumed Combs had pulled it off. Defendant related that Combs then took something like a broken broomstick and jammed it into the victim's rectum. Defendant also state that Combs choked the victim and burnt him with lighter fluid. While defendant never admitted any direct involvement in the murder, he did admit that he stayed with the victim while Combs left the area of the attack to get the broomstick and the lighter fluid used to burn the victim.

Upon further investigation by authorities, defendant was indicted on counts of kidnaping, rape, aggravated arson, felonious sexual penetration, aggravated robbery and aggravated murder with specifications.

On January 21, 1986, defendant's trial began in front of a three judge panel. Among the voluminous testimony from witnesses and the numerous exhibits, the following evidence was adduced.

Defendant's brother, [*52] Rymond L. Vaughn, testified that he saw defendant wash his gray pants on the night of the murder as well as on the following two days. Vaughn identified the pants in court, and testified that it looked like defendant was washing out "something red. *** It looked like blood to me ***."

Detective Sergeant William Carnahan of the Warren Police Department testified that on September 15, 1985, he went with eyewitness Donald Allgood to the place where Allgood stated he had seen defendant and Combs coming out of the wooded field, and where he had seen defendant toss "something" into the woods. Carnahan testified he returned to the area with workers from the Warren Parks Department, and that he and Detective James Teeple found a stick about six feet from the path where Allgood saw defendant and Combs walking.

Dr. Curtiz Mertz, a forensic pathologist, stated that: "It's my professional opinion, with a reasonable degree of medical certainty, Hill's teeth, as depicted by the models and the photographs that I had, made the bite on Fife's penis."

The defense called its own forensic pathologist, Dr. Lowell Levine, who stated that he could not conclude with a reasonable degree of certainty [*53] as to who made the bite marks on the victim's penis. However, Levine concluded: "What I'm saying is either Hill or Combs, or both, could have left some of the marks but the one mark that's consistent with the particular area most likely was left by Hill."

Doctor Howard Adelman, the pathologist who performed the autopsy of the victim's body, testified that the size and shape of the point of the stick found by Detective Carnahan was "very compatible" with the size and shape of the opening through the victim's rectum. Adelman described the fit of the stick in the victim's rectum as "very similar to a key in a lock."

At the close of trial, the trial panel deliberated for five hours and unanimously found defendant guilty on all counts, except the aggravated robbery count and the specification of aggravated robbery to the aggravated murder count.

Pursuant to R.C. § 2929.04(B), a mitigation hearing was held by the three judge panel beginning on February 26, 1986. The panel received testimony, and thereafter weighed the aggravating circumstances against the mitigating factors. The panel then sentenced defendant to ten to twenty-five years imprisonment for both aggravated arson and kidnaping, [*54] life imprisonment for rape and felonious sexual penetration, and the death penalty for aggravated murder with specifications.

Timothy Combs was also charged and convicted as a principal offender in the murder of Raymond Fife. See *State v. Combs*, 1988 Ohio App. LEXIS

4760, (Dec. 2, 1988), Portage App. No. 1725, unreported, 1988 WL 129449 (Ohio App. 11th Dist.).

Hill presented twenty-eight grounds for relief. Number twenty-six was used twice. Therefore, the Court has renumbered the last two grounds. The grounds, taken from the petition, are as follows:

> 1. Petitioner Hill was seized from his home under false pretenses utilizing psychological ploys and taken to the Warren Police Department for questioning on Monday September 16, 1985 in violation of his constitutional rights as guaranteed by the Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.
>
> 2. Petitioner's rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated when police officers promised him that in exchange for his cooperation nothing bad would happen to him and that nobody was going to hurt him, when in fact, petitioner [*55] was convicted of capital murder and sentenced to death.
>
> 3. As a result of his limited educational abilities and his limited comprehension of legal concepts and principles, Petitioner Hill was legally incompetent to participate in the legal system at all times herein; therefore, he was incompetent to waive his right to a jury trial and to waive his Miranda rights at the time of his interrogation by police in violation of the Fifth, Sixth, Eighth and Fourteenth

Amendments to the United States Constitution.

4. When the trial court had, or should have had a "bona fide" doubt as to Petitioner's competency, the court had an obligation to hold a competency hearing to investigate the petitioner's rational understanding of the proceedings. Failure to do so violated the petitioner's constitutional rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

5. Petitioner's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were denied when the court did not determine on the record that he knowingly, intelligently and voluntarily waived his right to a jury trial.

6. Petitioner [*56] Hill was denied the effective assistance of counsel at the fact finding phase of his trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Petitioner Hill was denied effective assistance of counsel at the fact finding phase of his trial when counsel failed to request and insist upon a record being made of all sidebars and in-chamber conferences so as to preserve the record for future court review.

Counsel failed to pursue his motion for change of venue.

Counsel failed to attempt to seat a jury prior to waiving Petitioner's right to a jury trial.

Counsel failed to ensure that Petitioner understood various ramifications of waiving his right to a jury trial and how same would affect his rights at trial and on appeal.

Counsel failed to object to an officer's testimony that he believed that Petitioner was lying during questioning by police.

Counsel failed to object to the Prosecutor[']s improper closing argument or to move for mistrial based on said arguments.

Counsel failed to move for a judgment of acquittal at the close of the state's case.

7. At Petitioner's trial the court admitted testimony [*57] and evidence which denied Hill of his due process, equal protection and impartial jury rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

8. The state's failure to provide timely discovery of photographs utilized by a state expert witness in formulating an opinion elicited at trial deprived Petitioner Hill of his rights of due process, effective assistance of counsel, and confrontation as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

9. The state failed to provide timely discovery of numerous exhibits thereby depriving the Petitioner of his rights of due process, effective assistance of counsel and confrontation as guaranteed by the Fifth, Sixth, Eighth and

Fourteenth Amendments to the United States Constitution.

10. Petitioner Hill was denied his right to a fair trial and an impartial fact-finder as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution when the State of Ohio engaged in prosecutorial misconduct during closing arguments in both the fact finding and penalty phases of the trial.

11. Petitioner Hill was denied [*58] the effective assistance of counsel at the mitigation phase of his trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Petitioner Hill was denied effective assistance of counsel when trial counsel failed to have appropriate expert testimony presented at trial during the mitigation phase.

Trial counsel failed to secure expert assistance that could explain the dynamics of the accused's environment and how it led him to commit the crime in question.

Trial counsel also failed to secure psychological experts that could explain to the court the various learning problems Petitioner had and how this would contribute to the matter before the court.

12. Petitioner's right to be free from cruel and unusual punishment and his right to due process of law as guaranteed by the Eighth and Fourteenth Amendments to the United

States Constitution were violated when the Ohio sentencing scheme requires a mandatory sentence of death when a three judge panel finds that the aggravating circumstances outweigh the mitigating circumstances.

13. When the three judge panel failed to consider or give weight to all of the evidence [*59] Petitioner presented in mitigation, Hill was denied his constitutional rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

14. Ohio's statutory provisions governing the imposition of the death penalty do not meet the prescribed constitutional requirements of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

15. Appellant's death sentence was imposed in violation of his rights to due process and freedom from cruel and unusual punishment as encompassed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution when the three judge panel improperly considered non-statutory aggravating factors.

16. Petitioner Hill was denied his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution when the court on appellate review of his sentence, considered non-statutory aggravating factors.

17. Petitioner Hill was deprived of having a full and fair evidentiary hearing in state post-conviction proceedings as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

18. The Ohio state courts [*60] have effectively converted Ohio's post-conviction procedure into a meaningless ritual, rather than the statutorily mandated process for those convicted of a criminal offense to obtain redress for violations of their rights under the Ohio Constitution and the Constitution of the United States. As a result Petitioner was denied his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

19. Petitioner Hill was denied his rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution when his confession was taken without the procedural safeguards provided by said Amendments.

The state's failure to properly administer Petitioner his "Miranda rights" violated his constitutional rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

20. Petitioner's rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution were violated when he was subjected to numerous interrogations by at least three law enforcement officers, one of whom was his uncle, without the benefit of counsel, when the officers knew that Hill was

a slow learner [*61] and therefore, susceptible to the pressures exerted by the authorities.

The statements given were not knowingly and intelligently given and therefore were admitted at trial in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

21. The admission of other crimes, wrongs or acts allegedly committed by the petitioner into evidence at petitioner's trial violated the due process clause of the United States Constitution and therefore denied Hill his rights as guaranteed by the same.

22. When the State failed to prove by proof beyond a reasonable doubt and the three-judge panel failed to specifically find that Petitioner had the specific intent to kill Raymond Fife, Petitioner's conviction and death sentence were in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

23. Petitioner Hill was denied his right to a fair trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution when the court permitted the admission of gruesome, repetitive and cumulative photographs.

24. Petitioner's rights as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution [*62] were violated when without probable cause he was transported to the Warren Police Department when no prior judicial authorization had been given.

25. Petitioner Hill was denied his constitutional rights to a fair trial and due process of law when the trial court granted the prosecution's motion to quash several subpoenas of witnesses to testify regarding the arbitrary fashion by which the decision was made to seek the death penalty in Trumbull County, Ohio in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

26. Petitioner was denied his right to expert assistance upon collateral review of his convictions in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

27. Petitioner was denied his rights as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution when his request for expert assistance in his post-conviction petition to reexamine the dental evidence was denied.

28. Petitioner was denied his rights in violation of the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution when the three judge panel failed to [*63] specifically [sic] find that Appellant was the principal offender and/or that he acted with prior calculation and design.

LAW

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132 § 104 amending 28 U.S.C. § 2254 became effective on April

24, 1996. Before considering the issues raised by the petitioner, the Court must determine whether the new provisions of § 2254 requiring greater deference to the state court decisions, apply to the present case. On April 18, 1996, Hill filed a notice of intent to file a petition for writ of habeas corpus and a motion for appointment of counsel. The petition for writ of habeas corpus was not filed until December 2, 1996. Hill contends that his case should be deemed pending as of April 18, 1996, and that the AEDPA does not apply to his case.

The United States Supreme Court held in *Lindh v. Murphy*, 521 U.S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997), that amended § 2254 does not apply to habeas corpus cases that were pending when the Act was passed. *See Norris v. Schotten*, 146 F.3d 314, 323 (6th Cir. 1998), *cert. denied*, 525 U.S. 935, 119 S. Ct. 348, 142 L. Ed. 2d 287 (1998); [*64] *Rogers v. Howes*, 144 F.3d 990, 992 n.2 (6th Cir. 1998). The Sixth Circuit recently decided this issue in *Williams v. Coyle*, 167 F.3d 1036, 1038 (6th Cir. 1999). The court analyzed pertinent statutes in arriving at its decision. In determining the meaning of a statute, the words used must be given their ordinary meaning. *Id., citing Moskal v. United States*, 498 U.S. 103, 108, 112 L. Ed. 2d 449, 111 S. Ct. 461 (1990). Normally, a case is pending when a complaint or petition is filed. *Id.* Rule 3 of the Federal Rules of Civil Procedures provides that "[a] civil action is commenced by filing a complaint with the court." The Sixth Circuit found comparable the application for a writ of habeas corpus to the filing of a civil complaint. Also, the Federal Rules of Civil Procedure apply to § 2254 cases to the extent that they do not conflict with the Rules Governing Section 2254

Cases. *Id.; See* 28 U.S.C. § 2254, R. 11. The court further found that the specific rules governing § 2254 cases require an applicant to file an application in a specific form in the district court but they do [*65] not expressly address the commencement of the proceedings. *Id.;* 28 U.S.C. § 2254, R. 2, 3. Therefore, the court concluded that Fed. R. Civ. P. 3 requires a presumption that a habeas corpus case is filed with the filing of an application for the writ. *Id.* In addition, the court opined that the language of the habeas corpus provisions reinforce this presumption. For instance, § 2254(e) refers to "a proceeding instituted by an application for a writ of habeas corpus." 28 U.S.C. § 1914(a) provides that the "district court shall require the parties instituting any civil action, suit or proceeding ... to pay a filing fee of $ 150, except that on an application for a writ of habeas corpus the filing fee shall be $ 5. The statutes associate the commencement of a habeas corpus proceeding with the filing of an application. Since Hill's application for writ of habeas corpus was filed after the enactment of the AEDPA, the Court finds that amended § 2254 is applicable to his case.[1]

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[1] 28 U.S.C. § 2254(d), as amended, provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

[*66] PROCEDURAL DEFAULT

A state prisoner must exhaust his state remedies before bringing his claim in a federal court habeas corpus proceeding. 28 U.S.C. § 2254(b), (c); *Rose v. Lundy*, 455 U.S. 509, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982). A federal court will not review a question of federal law decided by a state court if the state court's ruling is based on a state law ground that is independent of the federal question and is adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991). This rule applies to substantive or procedural law. *Id.*

The petitioner satisfies the exhaustion requirement when the highest court in the state in which the petitioner has been convicted has had a full and fair opportunity to rule on his claims. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994); *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). If the petitioner still has a remedy in the state courts wherein the state has an opportunity to rule on federal constitutional questions regarding the petitioner's case, exhaustion has not occurred. *Rust v. Zent*, 17 F.3d at 160. [*67]

When a habeas corpus petitioner is unable to present his claims to the state court because of a procedural default, he has waived those claims for purposes of habeas corpus review unless he can show cause for the default and prejudice resulting from the

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(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

alleged constitutional ground. *Wainwright v. Sykes*, 433 U.S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977).

The Sixth Circuit, in *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), prescribed four factors to determine a claim of procedural default. *Id.*, at 138.

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim, and that the petitioner failed to comply with the rule ... Second the court must decide whether the state courts actually enforced the state procedural sanction ... Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim ... once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must [*68] demonstrate under *Sykes* that there was "cause" for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

A state court's opinion may sometimes be ambiguous as to whether its reference to state law is an adequate and independent state ground for its judgment. *Harris v. Reed*, 489 U.S. 255, 261, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989). In *Michigan v. Long*, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983), the United States Supreme Court set forth a rule to be used by federal courts in overcoming any ambiguity. In such situation, the court will assume that the state court's decision did not rest on independent and adequate state grounds when it is not clear that it did so and when it fairly

appears that the state court rested its decision primarily on federal law. *Id.* at 1042. In other words, if it fairly appears that the state court's decision rested primarily on federal law, the court may reach the federal question on review unless the state court's decision clearly rests upon independent and adequate state grounds. *Harris v. Reed,* 489 U.S. at 261.

Harris v. Reed recognized [*69] a situation where a state court invokes a state procedural bar as to an issue and also discusses the merits. *Id.* at 264, n.10. When this occurs, a federal court is not released from the procedural bar but is precluded from deciding the merits of the claim. *McBee v. Abramajtys,* 929 F.2d 264, 267 (6th Cir. 1991); *Miller v. Rogers,* 1997 U.S. App. LEXIS 20919, 1997 WL 436246 (6th Cir).

The Ohio Eleventh District Court of Appeals determined that certain issues raised by Hill either could have been raised on direct appeal or had been previously addressed by the Ohio courts and thus were barred by the doctrine of *res judicata.* The merits of the issues were also discussed. In *State v. Perry,* 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), the Ohio Supreme Court ruled that "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on appeal from that judgment." [*70] *Id.* at 180. *See State v. Roberts,* 1 Ohio St.3d 36, 39, 1 Ohio B. 71, 437 N.E.2d 598 (1982).

The Supreme Court of Ohio dismissed Hill's appeal from the court of appeals' decision without comment. Where one state court has explained its reasons for its decision, later unexplained rulings rest on the same grounds. *YLST v. Nunnemaker*, 501 U.S. 797, 803, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991).

Hill contends that because his post-conviction issues are supported by evidence *de hors* the record as well as evidence appearing on the record, the issues are not subject to the doctrine of *res judicata*. *State v. Smith*, 17 Ohio St.3d 98, 17 Ohio B. 219, 477 N.E.2d 1128 (1985). Evidence *de hors* the record will permit issues to be litigated that were not raised or could have been raised on appeal. In order to overcome the bar of *res judicata*, the evidence *de hors* the record must show that the petitioner could not have appealed the constitutional claim based upon information in the original trial record. *State v. Combs*, 100 Ohio App.3d 90, 97, 652 N.E.2d 205 (Ohio App. 1st Dist. 1994); *State v. Cooperrider*, 4 Ohio St. 3d 226, 228, 4 Ohio B. 580, 448 N.E.2d 452 (1983).

But evidence presented outside the [*71] record must satisfy the same threshold standard of validity, otherwise it would be too easy to defeat the doctrine of *res judicata* as set forth in *Perry*. *State v. Coleman*, 1993 Ohio App. LEXIS 1485, 1993 WL 74756 (Ohio App. 1st Dist). The evidence that was available to the petitioner at the time of the direct appeal is not *de hors* the record simply because it was not raised at that time. *State v. Arrington*, 1993 Ohio App. LEXIS 3693, 1993 WL 277539 at *1 (Ohio App. 9th Dist.)

Hill argues generally that his post-conviction petition was supported by evidence *de hors* the record. However, there are no specific arguments as to why each issue found by the state courts to be procedurally barred by *res judicata* should be considered by the federal court on the existence of evidence *de hors* the record. *Res judicata* constitutes a state procedural rule utilized by the Ohio courts throughout Hill's post-conviction proceedings.

The Sixth Circuit has held that Ohio's application of the doctrine of *res judicata* pursuant to *Perry* is an adequate and independent state ground. *Brooks v. Edwards*, 1996 U.S. App. LEXIS 25319, 1996 WL 506505 at *5 (6th Cir. 1996); *see Mapes v. Coyle*, 171 F.3d 408, 421 (6th Cir. 1999). [*72] The doctrine of *res judicata* has been explicitly set forth in numerous Ohio decisions and Ohio courts have refused to hear cases on the merits because of this doctrine. *Id. State v. Cole*, 2 Ohio St. 3d 112, 113, 2 Ohio B. 661, 443 N.E.2d 169 (1982); *State v. Perry*, 10 Ohio St. 2d at 180.

The Ohio Supreme Court may occasionally choose to address the merits of a claim that is procedurally barred from review on the basis of *res judicata*. An occasional exception does not indicate inadequacy. Despite some inconsistencies, a "general rule" that is usually applied in the majority of cases, is entitled to be considered an adequate and independent state ground. *Plath v. Moore*, 130 F.3d 595, 602 (4th Cir. 1997), *cert. denied*, 523 U.S. 1143, 118 S. Ct. 1854, 140 L. Ed. 2d 1102 (1998). Hill has not brought this argument before the Court. This Court realizes that Ohio courts may sometimes deviate from their general rules but there is no indication that they do

so on a regular basis. A petitioner has no reasonable expectation that the rule in *Perry* has been abandoned. The third prong of the *Maupen* test has been satisfied.

Procedural default [*73] is not applicable if the petitioner can show cause for his failure to follow the procedural requirements and actual prejudice resulting from those requirements. Cause and prejudice may be shown by offering proof of ineffective assistance of counsel or that the issue was so novel at the time of appeal that the petitioner's attorney could not reasonably have been expected to raise it. *Reed v. Ross*, 468 U.S. 1, 9, 82 L. Ed. 2d 1, 104 S. Ct. 2901 (1984); *Carpenter v. Mohr*, 163 F.3d 938, 943 (6th Cir. 1998). Hill has not attempted to show cause and prejudice to excuse his failure to follow Ohio's procedural requirements. The Court finds that the final prong of the *Maupin* test has been satisfied. The issue of procedural default will be discussed upon examination of the individual grounds for relief presented by Hill.

INDIVIDUAL GROUNDS FOR RELIEF

Grounds one, two, three, nineteen and twenty generally involve Hill's competency during the investigative stage of the proceedings. In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), the United States Supreme Court concluded that the Fifth Amendment protects persons in all settings in which their [*74] freedom is curtailed in any significant manner from being compelled to incriminate themselves. *Id.* at 467. An individual under investigation in custody and accused of a crime is under severe pressure to speak where he would not otherwise do so. *Id.* To alleviate

these pressures and to permit a person to exercise his Fifth Amendment privilege against self-incrimination, the accused must be adequately informed of his rights and the exercise of those rights must be honored. *Id.* The well known *Miranda* rights were derived from this case.[2]

Essentially, Hill asserts that he has a mental deficiency which caused him to be incompetent to understand his *Miranda* rights; [*75] that he was in special education classes throughout his public school years; that his I.Q. ranged from the low 70's to the high 40's in various I.Q. tests; that he received no intellectual support or encouragement for positive development when growing up; that Hill's neurological disability affected his ability to reason as well as his judgment, planning and problem solving; that as a result, he did not understand the concept of invoking a constitutional right and invoking a choice in regard to submitting to police interrogation.

In *Colorado v. Connelly,* 479 U.S. 157, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986), the respondent suffered from a psychosis that interfered with his ability to make free and natural choices although he understood his *Miranda* rights. The Colorado courts suppressed statements that he made to the police on the basis that he was deprived of his due process rights under the Fourteenth Amendment. The

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[2] The Fifth Amendment, part of the Bill of Rights of the Constitution, protects an individual against government action. In *Malloy v. Hogan,* 378 U.S. 1, 6, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964), the Supreme Court held that the privilege against self-incrimination applied to the states through the Fourteenth Amendment.

Supreme Court reversed, holding that coercive police activity is a necessary predicate to the finding that a confession was not voluntary. *Id.* at 17. A mental condition is a significant factor as to voluntariness, but a defendant's mental condition, by itself [*76] and apart from its relation to official coercion, should not dispose of the inquiry into constitutional voluntariness. *Id.* at 164. Furthermore, the voluntariness of a confession depends on the absence of police overreaching, not on whether there was free choice. *Id.* at 170. The choice to make a statement by one in police custody must be a free and deliberate choice rather than one obtained by intimidation, coercion or deception. *Id.* Mental retardation alone is insufficient to render a confession involuntary. *United States v. Macklin,* 900 F.2d 948, 952 (6th Cir. 1990), *cert. denied,* 498 U.S. 840 (1990).

The above discussion contains a general synopsis of the law involved in grounds one, two, three, nineteen and twenty. The Court will now address each of these grounds individually.

FIRST GROUND FOR RELIEF

> 1. Petitioner Hill was seized from his home under false pretenses utilizing psychological ploys and taken to the Warren Police Department for questioning on Monday, September 15, 1985, in violation of his constitutional rights as guaranteed by the Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. [*77]

Hill raised this claim on direct appeal. The Ohio Supreme Court found this argument to be without merit. The court stated:

> Our view of the record, however, indicates that defendant voluntarily went with the police officers to the police station at the urging of his mother. Defendant was not taken into custody at the time the police officers brought him to the police station; the police had come to his home to try to get him to go to the police station to sign the prior statement he had made to Sergeant Steinbeck. The officers also wanted to get a statement from defendant's mother concerning defendant's whereabouts on the day of the Fife murder. In addition, defendant indicates on the audiotape made on September 16, 1985 that he was not under arrest when he went to the police station and that he gave his statement voluntarily.

State v. Hill, 64 Ohio St.3d at 320.

Title 28 U.S.C. § 2254(e)(1) provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court, a determination of a factual issue made by a State court shall be presumed to [*78] be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Hill argues that the facts show that he did not want to go to the police station but his mother told him he had to go. There is no description of a psychological ploy to get Hill to the police station. Hill has not demonstrated that the Ohio court's conclusion was contrary to established constitutional law or that it was based on an unreasonable

determination of the facts. Therefore, Hill's First Ground for Relief is without merit.

SECOND GROUND FOR RELIEF

> 2. Petitioner's rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated when police officers promised him that in exchange for his cooperation nothing bad would happen to him and that nobody was going to hurt him, thereby promising leniency, when in fact, Petitioner was convicted of capital murder and sentenced to death.

On September 16, 1985, Hill was questioned for hours by as many as three officers at a time. One of the officers, Morris Hill, was Hill's uncle. His uncle, while questioning him alone, indicated that [*79] nobody wanted to hurt him and that nothing bad was going to happen to him. The petitioner asserts that this statement constituted a promise of leniency and any statements that he made were involuntary.

Detective Hill testified at Hill's suppression hearing. After two other detectives left the room, Detective Hill was alone with Petitioner Hill. Detective Hill stated:

> At that point in time, you know, I set [sic] there, and I tried to let Danny know that wasn't anyone going to hurt him. No one was going to do anything to him, but the fact that I know he was involved in the homicide, and I wanted to get the truth out of him. At that point in time, he looked at me and tears started to come from his eyes, he told me - he

> said, "I was there. I was in the field when he got murdered." When the young Fife kid got murdered.

The record shows that no one told Hill he would walk if he told the truth nor were any threats made against him if he refused to talk. This issue was raised by Hill on direct appeal to the state courts. The Supreme Court of Ohio found that his statements were admissible because there was nothing in the record that could be characterized as a plea-bargain. [*80] *State v. Hill,* 64 Ohio St.3d at 321. Just because he cooperated and made statements against his interests does not require a conclusion that there must have been coercion or some other improper conduct causing him to give that statement. *United States v. Parker,* 997 F.2d 219, 223 (6th Cir. 1993).

The Supreme Court of Ohio's decision on the merits was based on a reasonable determination of the facts presented in the state court proceedings. The evidence shows that Hill was aware of his *Miranda* rights and that he voluntarily spoke to the police. In fact, he approached the police about the murder before he was considered a suspect. There is nothing in the record to show that Hill's admissions were made in exchange for leniency. Ground Two is without merit.

THIRD GROUND FOR RELIEF

> 3. As a result of his limited educational abilities and his limited comprehension of legal concepts and principles, Petitioner Hill was legally incompetent to participate in the legal system at all times herein; therefore, he was incompetent to waive his right to a jury

> trial and to waive his Miranda rights at the time of his interrogation by police in violation [*81] of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The third ground for relief consists of two parts, incompetence to waive a jury trial and incompetence as to waiver of *Miranda* rights. The first contention was not raised on direct appeal. It was presented to the trial court in post-conviction proceedings which held that this claim was barred by the doctrine of *res judicata*. The court of appeals affirmed the trial court's decision on this issue. *State v. Hill*, 1995 Ohio App. LEXIS 2684, 1995 WL 418683 at *4 (Ohio App. Dist. 11). The four-part test set forth in *Maupin v. Smith*, 785 F.2d at 138, discussed above in detail applies to this issue.

Hill argued on direct appeal in the state court that his statements to the police were involuntary because he is mentally retarded. The Supreme Court of Ohio cited *Colorado v. Connelly, supra*, in finding that there was no evidence of police coercion or overreaching necessary for a finding of involuntariness of statements made by an interrogee with low mental aptitude. *State v. Hill*, 64 Ohio St. 3d at 318. The facts found by the state court were as follows: [*82]

> The record herein indicates that defendant made a statement to Sergeant Steinbeck after waiving his Miranda rights, but that Steinbeck apparently forgot to have defendant sign his transcribed statement. Subsequently, Steinbeck and Detective Hill went to defendant's home to have him sign the

> statement and have his mother make a statement concerning defendant's whereabouts on the day of the Fife murder. Defendant and his mother voluntarily went to the police station with the officers where he was again given his Miranda rights before and during the time he made some incriminating statements to the police officers concerning his presence at the murder.

Hill was given his *Miranda* rights many times. The Ohio Supreme Court noted that, although Hill had some mental deficiency, he had prior dealing with the criminal process and the mental deficiencies did not invalidate the voluntariness of his statements. *Id.*

The Court finds that there is no evidence that the state court decisions were contrary to established federal law or based on an unreasonable determination of the facts. Ground Three is without merit. 28 U.S.C. § 2254(d)(1) and [*83] (2).

NINETEENTH AND TWENTIETH GROUNDS FOR RELIEF

> 19. Petitioner Hill was denied his rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution when his confession was taken without the procedural safeguards provided by said Amendments.
>
> 20. Petitioner's rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution were violated when he was subjected to numerous interrogations by at least three law enforcement officers, one

> of whom was his uncle, without the benefit of counsel, when the officers knew that Hill was a slow learner and therefore, susceptible to the pressures extended by authorities.

Hill argues that he was interrogated several times without counsel being present and without having been provided the required *Miranda* rights. Hill's uncle, Detective Morris Hill, was one of the officers present at Hill's interrogation. His testimony at a suppression hearing is credible and eliminates the theory that his nephew was coerced into confessing. Following is a pertinent part of Detective Hill's testimony at the suppression hearing:

> Q. Have you dealt with him on a professional basis? [*84]
>
> A. Yes, sir, I have.
>
> Q. Been involved with giving him his Constitutional Rights in the past?
>
> A. Yes, sir, that is correct.
>
> Q. Approximately how many times has he been arrested by your police department?
>
> A. Approximately 15 to 20 times.
>
> Q. Approximately how many times did you give him his rights?
>
> A. About four or five times I've given him his rights.
>
> ***
>
> Q. Okay. You've had the opportunity over the years to talk to him many times?
>
> A. Yes sir, I have.

Q. Would you describe his intelligence to the Court?

A. I would describe his intelligence as far as being fairly intelligent and very street wise; as we would call slick, as far as the street is concerned.

Q. Okay. What do you mean by that?

A. That he's the type of young man that - you know, in the streets, he has the knowledge of whatever he does out in the street, getting into trouble, he's slick enough to get out of it.

Q. When you talked to him, has he, at times, got slick with you?

A. He has in the past, yes.

Q. And how about his relationship with you and his mother? How has that been when you're involved with policy [sic] work?

A. Well, his mother [*85] has called me on numerous occasions when he has been arrested at the Warren Police Department to go down and talk to him. This is when he was a juvenile.

Q. Have you done so?

A. Yes sir, I have.

***

Q. On or about the 16th of September, 1985, did you have an occasion to go see your nephew at his house?

A. Yes sir, I did.

Q. And would you tell the Court when that was?

A. Yes, sir. It was approximately 9:30 on September the 16, 1985. I was asked to go along with Sergeant Steinbeck to my sister's residence, which is 1394 Fifth Street.

Q. And what was your purpose to go there?

A. Our purpose was to go to that residence and get Danny to come to the police department to sign a statement that he had given to the police department on the 13th of September.

Q. Did you have probable cause to arrest him at that time?

A. No sir, we did not.

Q. And would you tell the Court how you proceeded as to getting him to come down to the police station.

A. Yes, sir. At that time, like I said, approximately 9:30 A.M. that morning, we arrived at my sister's residence, which is, like I said, 1394 Fifth Street. We went there. We knocked on the [*86] door. My sister came to the door. At that point in time, I had advised my sister - I say, "Could you get Danny up and have him come down to the station to sign a statement that he had given to the police officers on the 13th." At that time, she yelled upstairs. She said, Danny," she said, "get up!" She said, "The police is down here, and Morris is down here." And at that point in time, he said, "I'm not going nowhere." And at that time, my sister went halfway up the step, and

she said, "I say get your ass up out of the bed. You don't have anything to hide, so get down here!" At that point in time, Danny came down the stairs with his shirt and pants on. He came down, he went into the kitchen, and he got his tennis shoes and put them on, and at that point in time, him, along with his mother, we went down to the police station.

Q. Did he make any protest to you about going down to the police station personally?

A. No, sir. At no time he made no protest to me.

Q. And did you explain to him why you were asking him to come down?

A. Yes, sir. We advised him that the statement that he had gave officers on the 13th, we wanted him to come down to the police department to [*87] sign it.

***

Q. Now, you get to the police department, and where do you go?

A. We went to Interview Room Number 1.

Q. And when you say "we," who all -

A. Along with Detective Steinbeck and Danny. We had my sister sit out front.

Q. Now, did there come a time he was given his Constitutional Rights?

A. Yes, sir. When I got him to the Interview Room at that point in time, I said, "Danny," I said, "this is what I want you to understand. I want you to understand this very clearly." I

said, "I want you to understand what your rights are." I said, "At this time, you're not under arrest, but I want to give you your rights just in case you would say something that might incriminate you." And at that point in time, I gave him his rights verbally.

Q. And what did he say as to his rights? Did he ask any questions? Did he indicate he understood or what?

A. He advised me at that point in time that he understood exactly what his rights were.

Q. So, you indicated then you were going to ask some questions or [sic] him?

A. Yes, sir.

Q. And did you tell him what you were going to ask questions of him about?

A. Yes, sir, I did.

Q. And what [*88] did you tell him?

A. I told him we were going to ask him questions about the Fife homicide.

Q. He protest about that?

A. No, sir, he did not.

***

Q. So, after you gave him his rights, he signed this statement?

A. Yes, sir, he did.

Q. By the way, can your nephew read and write?

A. Yes, sir, he can.

Q. Then what happened?

A. After I advised him of his rights and he signed the statement, at that point in time, Sergeant Steinbeck and myself started questioning him about the homicide that took place behind the Valu-King on Palmyra Road.

***

Q. What was said? How was his attitude when you started questioning him?

A. Well, his attitude was very cooperative, but you could tell as you talked to him that he was trying to deceive you, you know, in the way of trying to hide something. You know, he continued to lie to us and tell us different things that we, at that point in time, would know it wasn't the truth.

Q. Did you threaten him?

A. No, Sir, I did not.

Q. Did you make any threats I mean any promises to him?

A. No, sir, I did not.

Q. So, explain to the Court exactly how you proceeded to talk to him.

A. [*89] As I proceeded to talk to him, I told Danny - I said "Danny, listen." I said, "You got to understand one thing. At this point in time, I believe that you had something to do with the homicide that happened behind the Valu-King." I said, "My mind, I know that you had something to do with it just because of the fact some of the crimes that you were involved in

before made me believe this." And I continued to talk to him just in that manner.

***

Q. Okay. And how long were you alone with him?

A. I was along [sic] with him no more than a couple minutes at the most.

Q. Would you tell the Court in your own words everything that happened for those couple of minutes?

A. Yes, sir. At that point in time, you know, I set [sic] there, and I tried to let Danny know that wasn't anyone gong [sic] to hurt him. No one was going to do anything to him, but the fact that I know that he was involved in the homicide, and I wanted to get the truth out of him. At that point in time, he looked at me and tears started to come from his eyes. When tears started coming from his eyes, he told me - he said "I was there. I was in the field when he got murdered." When the young Fife kid got [*90] murdered.

Q. Those were the words of your nephew?

A. Those were the words of my nephew.

***

Q. Did there come a time he would ask for a lawyer?

A. No, sir, at no given time did he ask for an attorney.

Q. Did there come a time when he asked to leave?

A. No, sir, he did not.

Q. Come a time that he asked to see his mother or wanted to remain silent?

A. Not to remain silent at no time, no.

Q. Was there anything he requested of you that you refused during that period of time and up until that period of time that Monday?

A. No, no, sir.

***

Q. Now, I'm going to hand you what's been marked as Exhibit Number 3 for the State of Ohio in this matter, and would you tell the Court whether or not you recognize that copy of a document.

A. Yes. This is the waiver of rights that Danny Lee Hill signed.

Q. And would you tell the Court how that was given to him.

A. I - I first read the rights to Danny from this paper, and at that point in time, I turned the paper around to him, and I said, "Danny, do you understand this?" And I gave it to him to look at, and at that point in time, I'm not sure whether he read it. He looked at it and [*91] signed his name to the bottom of it.

Q. You read that whole piece of paper?

A. That is correct, sir.

Q. And that was recorded?

A. That is correct.

Q. And he signed it and waived his rights in your presence?

A. Yes, sir, that is correct.

Q. How long after that did 'you continue the recording of Danny Hill's statement?

A. Right after he signed it and everything, we continued.

***

Q. What time was that?

A. The recording started at approximately 11:30.

Q. And what time did you give him his rights?

A. We gave him his rights at 11:55.

Q. And you already testified you had verbally given him his rights about 10:00 o'clock or a little after?

A. That is correct, sir.

Q. What happens next?

A. After we got finished with the recording, at that point in time, his mother, she came in and talked to him, and then he was taken to a room where we had a videotape setup, and at that point in time, he was taped with the video.

Q. And did he voluntarily agree to have his statement videotaped?

A. Yes, sir, he did.

Q. Make any requests to see a lawyer?

A. No, sir, he did not.

> Q. By the way, did his mother [*92] at any time ask to have a lawyer see him?
>
> A. No, sir, she did not
>
> ***
>
> Q. Was your nephew at anytime mistreated, coerced, promised anything to cause him to change his mind and get something off his mind?
>
> A. Not to my knowledge, sir.

This testimony of Detective Hill shows that petitioner Hill's statements were not the result of police coercion. Hill had been arrested numerous times and was accustomed to dealing with the police. On other occasions his uncle had read him his rights. Hill's decision to make a statement appears to be a deliberate choice free from coercion, or intimidation. The Nineteenth and Twentieth Grounds for Relief are without merit.

FOURTH GROUND FOR RELIEF

> 4. When the trial court judge had, or should have had a "bona fide" doubt as to Petitioner's competency, the Court had an obligation to hold a competency hearing to investigate the Petitioner's rational understanding of the proceedings. Failure to do so violated the Petitioner's constitutional rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This issue was raised under state law on direct appeal. Hill argued [*93] in the state court that the trial court should have held a hearing as to his

alleged incompetence. The United States Supreme Court ruled that 28 U.S.C. § 2254 require a federal habeas petitioner to allow the state a "fair opportunity to apply controlling legal principles to the facts concerning his constitutional claim." *Picard v. Connor*, 404 U.S. 270, 276-77, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971). A state law claim is insufficient. *Anderson v. Harless*, 459 U.S. 4, 6, 74 L. Ed. 2d 3, 103 S. Ct. 276 (1982). A citation to a state court decision predicated on state law will, not ordinarily, alert the reviewing court of a potential federal claim. *Picard*, 404 U.S. at 276. The state court must be presented with the same claim that is submitted to the federal court. *Id.*

Hill also presented this issue in his post-conviction proceedings. The court reiterated that Hill had a mental deficiency but that he had experience with the criminal justice system so that he was not a malleable victim of police suggestion. The court held that the trial court properly dismissed this claim under *res judicata*. *State v. Hill*, 1995 Ohio App. LEXIS 2684, 1995 WL 418683 at *4-5. The [*94] Fourth Ground for Relief is procedurally defaulted under *Maupin v. Smith*, 785 F.2d at 138.

FIFTH GROUND FOR RELIEF

> 5. Petitioner's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were denied when the court did not determine on the record that he knowingly, intelligently and voluntarily waived his right to a jury trial.

The fifth ground for relief was raised on direct appeal. The Supreme Court of Ohio, based on state

law, found that the trial court correctly determined that Hill voluntarily waived his right to a jury trial.

On January 7, 1986, the trial court held a hearing concerning Hill's waiver of his right to trial by jury. The judge explained the differences between a jury trial and a trial before a three judge panel. Hill acknowledged that he understood the court's explanation.

The Sixth Circuit Court of Appeals has determined that there is no constitutional requirement that a court conduct a hearing with a defendant prior to a jury trial waiver. *United States v. Martin*, 704 F.2d 267, 271 (6th Cir. 1983); *United States v. Sammons*, 918 F.2d 592, 596 (6th Cir. 1990), [*95] *cert. denied*, 510 U.S. 1204, 127 L. Ed. 2d 671 (1994). An intelligent waiver occurs if the defendant is aware that a jury consists of 12 members of the community, that he may participate in the selection of the jurors, the verdict by the jurors must be unanimous and that a judge alone will decide guilt or innocence if he waives a jury. *United States v. Martin*, 704 F.2d at 273. Nevertheless, this knowledge is not constitutionally required. The Fifth Ground for Relief is without merit.

SIXTH GROUND FOR RELIEF

> 6. Petitioner Hill was denied effective assistance of counsel at the fact finding phase of his trial as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

The sixth claim for relief contains seven reasons why defense counsel were ineffective. For

convenience, they will be separated into groups requiring similar conclusions of law.

Subgrounds (A) and (B) are as follows:

> (A) Petitioner Hill was denied effective assistance of counsel at the fact finding phase of his trial when counsel failed to request and insist upon a record being made of all sidebars and in-chamber conferences [*96] so as to preserve the record for future court review.
>
> (B) Counsel failed to pursue his motion for change of venue.

Neither of these grounds were raised on direct appeal nor in post-conviction proceedings.[3] Failure to present these issues requires application of the four-part test prescribed in *Maupin v. Smith*, 705 F.2d at 138. As the court previously concluded, all four prongs of *Maupin* have been satisfied.

The Sixth Amendment provides that one of the elements of a fair criminal trial is the right of a defendant to have the assistance of counsel for his defense. *Strickland v. Washington*, 466 U.S. 668, 685, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The right to counsel is [*97] crucial because our adversarial system requires access to counsel's skill and knowledge necessary for the defense of a criminal charge. *Id.*, 466 U.S. at 686. Because assistance of counsel is so important, an accused is entitled to have counsel appointed if retained counsel

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[3] Hill did allege in post-conviction proceedings that he was prejudiced by the failure of the trial court to record all proceedings. It did not involve ineffective assistance of counsel. In any event, the court of appeals held that it should have been raised on direct appeal and was barred by *res judicata*.

cannot be obtained. *Id.* It follows that the right to counsel means the right to effective assistance of counsel. *Id., citing McMann v. Richardson,* 397 U.S. 759, 771, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970).

In *Strickland,* the United States Supreme Court established a two-part test against which counsel's performance must be evaluated. First, the defendant must establish that counsel's performance was so substandard that it "fell below an objective standard of reasonableness." *Id.,* at 687. Second, it must be established that there was a reasonable probability that counsel's errors affected the outcome of the trial. *Id.* The petitioner must show that counsel's errors were so serious he was deprived of a fair trial. *Id.*

The *Strickland* court stated:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess [*98] counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Id.* at 689.

In order to avoid the temptation to secondguess, the reviewing "court must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." *Id.* There is a presumption that, under the circumstances, the defense attorney's actions might be considered sound trial strategy. *Id. See Groseclose v. Bell,* 130 F.3d 1161, 1167 (6th Cir. 1997), *cert. denied,* 523 U.S. 1132, 118 S. Ct. 1826, 140 L. Ed. 2d 962 (1998).

The following four subgrounds were raised on direct appeal in *State v. Hill*, 64 Ohio St.3d at 330:

> (C) Counsel failed to attempt to seat a jury prior to waiving Petitioner's right to a jury trial.
>
> (D) Counsel failed to insure that Petitioner understood various ramifications of waiving his right to a jury trial and how same would affect his rights at trial and on appeal.
>
> (E) Counsel failed to object to an officer's [*99] testimony that he believed that Petitioner was lying during questioning by police.
>
> (F) Counsel failed to object to the Prosecutor's improper closing argument or to move for mistrial based on said arguments.

Hill's counsel did not address these issues in their proposed findings of fact and conclusions of law. Only the first two issues were discussed briefly in Hill's brief submitted in his direct appeal to the Supreme Court of Ohio. As to issue (C), he argued that waiving the jury was premature. His attorney should have tried to impanel a jury to determine if a change of venue was necessary. Further, since any verdict had to be unanimous, one juror could affect the outcome of the proceedings.

A change of venue would be irrelevant if the trial was conducted by a three judge panel. There would be no need to impanel a jury for that purpose. In any criminal case, there is always a chance that one juror will disagree with the other eleven. Counsel would always be considered ineffective when trying a criminal case to the court. On January 7, 1986, a hearing was conducted by the trial court concerning

Hill's waiver of a jury trial. After an explanation of the consequences of [*100] a jury waiver, the court ordered a recess in order for Hill and his attorney to discuss the situation. Upon return, Hill acknowledged that he reviewed the waiver form and that he wanted to be tried by a three judge panel. Hill does not refute that such conversation with his attorney occurred. Considering the entire trial record, the evidence was certainly sufficient to convict Hill. He has not shown a reasonable probability that but for this alleged error, the outcome would have been different. The issue is not whether the defense attorney was inadequate, "rather it is whether he was so manifestly ineffective that defeat was snatched from the hands of probable victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992), *cert. denied*, 508 U.S. 975, 125 L. Ed. 2d 668 (1993).

The Supreme Court of Ohio reviewed the instances of ineffective assistance of counsel in accordance with *Strickland* and found no prejudice compelling reversal of Hill's conviction and sentence. This Court finds that the Supreme Court of Ohio's decision was a reasonable application of federal constitutional law and based on a reasonable determination of the facts.

> [*101] (G). Counsel failed to move for a judgment of acquittal at the close of the state's case.

This issue was not raised on direct appeal in the state court but was later presented in post-conviction proceedings. The court of appeals applied *Strickland* and determined that Hill was not prejudiced by the alleged omission and also ruled that the trial court

properly dismissed the matter under *res judicata*. The four-part test set forth in *Maupin v. Smith*, 785 F.2d at 138, discussed above in detail, applies to this issue. The Sixth Ground for Relief is without merit.

SEVENTH GROUND FOR RELIEF

> 7. At Petitioner's trial the court admitted testimony and evidence which denied Hill of his due process, equal protection and impartial jury rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Hill contends that the trial court improperly permitted an ambulance attendant who was at the scene when the victim was transported to the hospital to testify that the "scene was one of the most gruesome things [I've] ever seen." Also a broom stick admitted by the court was more prejudicial than probative.

The Supreme Court [*102] of Ohio made the following findings on this contention:

> The first example of error raised by defendant concerns the testimony of Raleigh Hughes, an ambulance attendant who arrived at the murder scene, who commented on the condition of the victim's body. In summarizing his impression of what he saw, Hughes stated that it was "one of the most gruesome things I've ever seen."
>
> While Hughes's testimony in this respect should probably not have been admitted, there has been no showing of prejudice that overcomes the presumption that the three-judge panel considered only the relevant,

> nonprejudicial evidence submitted. [citation omitted]
>
> Defendant next challenges the admission of the broomstick into evidence by arguing that there was no probative value in its admission. However, we believe that admission of the stick was properly justified for several reasons: (1) Donald Allgood testified that he saw defendant "flick" a stick into the woods at the time and near the place where the homicide took place; (2) defendant stated on tape that Tim Combs stuck "[a] stick ***like a broom handle thing" in the victim's rectal opening; and (3) Dr. Adelman testified that the shape of [*103] the stick in comparison to the injury inflicted in the victim's rectum was "very similar to a key in a lock." Given the foregoing testimony we find that the stick was properly admitted into evidence during the trial.

State v. Hill, 64 Ohio St.3d at 323-24.

This ground concerns evidentiary rulings under state law. Errors involving evidentiary matters, especially rulings regarding the admission or exclusion of evidence, usually are not questioned in a federal habeas proceeding. *Waters v. Kassulke*, 916 F.2d 329, 335 (6th Cir. 1990); *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988). Furthermore, in a nonjury trial introduction of incompetent evidence is not consequential in the absence of an affirmative showing of prejudice. *United States v. Joseph*, 781 F.2d 549, 552 (6th Cir. 1986); *United States v. McCarthy*, 470 F.2d 222, 224 (6th Cir. 1972).

The Ohio Supreme Court found that there was no showing of prejudice to overcome a presumption that the three judge panel considered only relevant nonprejudicial evidence. Federal law is similar. The Court finds that the ruling by the Supreme Court [*104] of Ohio was not an unreasonable application of clearly established federal law or that it resulted in a decision based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). The Seventh Ground for Relief is without merit.

EIGHTH AND NINTH GROUNDS FOR RELIEF

> 8. The state's failure to provide timely discovery of photographs utilized by a state expert witness in formulating an opinion elicited at trial deprived Petitioner Hill of his rights of due process, effective assistance of counsel, and confrontation as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.
>
> 9. The state failed to provide timely discovery of numerous exhibits thereby depriving the Petitioner of his rights of due process, effective assistance of counsel and confrontation as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The State provided discovery in response to Hill's motion but it failed to provide counsel access to certain photographs utilized by an expert witness in formulating his opinion. The opinion of the expert that certain bite marks on the victim's [*105] penis were made by Hill rested on these photographs. Ground nine concerns the testimony of Donald

Allgood, a witness who identified Hill from a photo array. Hill asserts that his constitutional rights were violated because the state failed to provide his counsel with the actual photo array thereby depriving him of the opportunity to contest the identification process. These grounds were raised before the Supreme Court of Ohio as Proposition of Law Number 16. *State v. Hill*, 64 Ohio St.3d at 327-28.

The Supreme Court of Ohio found that Hill's rights were not violated because the photographs of the victim's penis and the photo array were not material. The Court stated:

> In *State v. Wickline* (1990), 50 Ohio St.3d 114, 117, 552 N.E.2d 913, this court reaffirmed the standard of "materiality" set forth in *State v. Johnston* (1988), 39 Ohio St.3d 48, 61, 529 N.E.2d 898, 911, paragraph five of the syllabus:
>
> > "In determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the [*106] defense, the result of the proceeding would have been different. A 'reasonable probability is a probability sufficient to undermine confidence in the outcome. This standard of materiality applies regardless of whether the evidence is specifically, generally or not at all requested by the defense. (*United States v. Bagley*,

> ***[1984], 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 ... followed)"
>
> Upon reviewing the items enumerated by defendant, we find that his contentions in this respect are without merit. With regard to the pictures used by Dr. Levine, we point out that he was defendant's expert witness and it is undisputed the defense was aware, through discovery, that Dr. Levine concluded the bite marks could have been made by the defendant. Even if, defendant had had the photographs used by Dr. Levine, the outcome of the trial would not have been different.
>
> We also discern no prejudice to defendant from the state's failure to supply the photo array used by Donald Allgood. The photo array was not introduced at trial and was not "material" under the *Johnston* test. *Id.* at 327.

In *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), the Supreme Court [*107] held that the government's failure to provide the defense with exculpatory material violated due process. But there is no constitutional right to discovery in a criminal case and *Brady* did not create one. *Weatherford v. Bursey*, 429 U.S. 545, 559, 51 L. Ed. 2d 30, 97 S. Ct. 837 (1977). *Madsen v. Dormire*, 137 F.3d 602, 605 (8th Cir. 1998), *cert. denied*, 525 U.S. 908, 119 S. Ct. 247, 142 L. Ed. 2d 203 (1998). *Brady* did create a constitutional right to exculpatory evidence but not to all evidence that might be helpful in preparing for trial. *Gray v. Thompson*, 58 F.3d 59, 65 (4th Cir. 1995), *vacated on other grounds, Gray v. Netherland*, 518 U.S. 152, 135 L. Ed. 2d 457, 116 S. Ct. 2074 (1996).

The Supreme Court of Ohio determined using federal law that the photograph of the victim and the photo array were not material and the state's failure to provide them to the defense was not prejudicial. *United States v. Bagley.* Its decision was not an unreasonable application of clearly established federal law nor did it result in a decision based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d) [*108]. The Eighth and Ninth Grounds for Relief are without merit.

TENTH GROUND FOR RELIEF

> 10. Petitioner Hill was denied his right to a fair trial and an impartial fact-finder as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution when the State of Ohio engaged in prosecutorial misconduct during closing arguments in both the fact-finding and penalty phases of the trial.

Hill raised this issue on direct appeal to the state court based on the same statements presented to the federal court.[4]

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[4]The alleged statements constituting prosecutorial misconduct are as follows:

> 1. "You know, back on September 10th, our community had a little boy, and we've had a lot of little boys in our community, but this 12-year old boy we have not talked about too much. We've dealt with him in an abstraction. He hasn't been here. And the Court is aware of the leaps and bounds and the rights of victims. I'm not trying to ignore the procedural rights of the defendants in cases, but sometimes we forget and don't pay attention when we talk about Constitutional Rights of the defendant, and we don't, in the balance - how about

Raymond Fife's right to live? How about his Constitutional Rights to be here today, to be in school, to celebrate his 13th birthday with his parents."

2. "The question that is to be determined by this Court is whether that man [indicating to the defendant] and his buddy, Timothy Combs, engaged in a criminal enterprise wherein he destroyed and devoured a little boy on the 10th day of September of 1985. *** I can't imagine in my 10 years as being prosecutor that this could happen."

3. "Now, one witness that testified. Candyce Jenkins *** describes the defendant as an 'animal.' The other one hatred."

4. "*** But he [the defendant] followed him [Timothy Combs] back to the scene of the crime to look for evidence to destroy so they could cover up their heinous, unbelievable, animalistic behavior. He would make the Marquis deSade proud!"

5. "Now, we know on September 10th, 1985, the year of our Lord - and I'm going to go through, as I view the evidence - as Mr. Kontos and I see the facts to be and the truth to be."

6. "Maybe Mr. Lewis will argue that Raymond wasn't on the bike. It didn't have fingerprints. Well, there's an explanation, you don't necessarily have fingerprints on everything. And rain will affect fingerprints as it will affect blood."

7. "Who does this Court feel is more qualified? Mr. Dehus or Mr. Gelfius on the charcoal lighter as to paint thinner and hydrocarbons? I thought that his testimony was much more credible. I don't feel Mr. Dehus; it couldn't break down; very unlikely, and I don't think that's the case. I think that the witness from the Arson Lab who deals strictly with arson is the most credible witness in this case, and that substantiates the State's case."

8. "No one wants to testify against his brother, just like Morris Hill didn't want to testify against his nephew."

9. "Finally, Your Honors, to get this poor, dumb boy who really wouldn't do anything, who tried to sexually attack Mr. Melius, tried to put his mouth in the boy's penis, grabbed his penis, we know he did violently rape Mary Ann Brison in the same wooded area. Talked about how he talked hateful to her. We know what he did to Candyce Jenkins; had anal sex, oral sex, vaginal sex, once again, anal sex, had a knife and threatened to cut her vagina out; bit her on the breast. Seems to be his calling card; the bite. And when she screamed and yelled that it hurt, he said, 'Good! I want it to hurt.' And that's what this case is about. This case isn't just about a killing. This case is about an individual who thrives and relishes on inflicting pain and torture to other human beings."

10. "Raymond Fife was a 12-year-old boy; very active and vibrant, who was caught in the middle of a living hell caused by this defendant. Raymond Fife had no justice while he was living, but he demands justice now even in his absence, and justice demands, Your Honors, that you return a verdict of guilty. ***"

11. "The reason that it is so clear is because the defense has not shown by or has not substantiated or brought about any mitigating factors in this case, and it's very clear, aggravating circumstances, especially three of them, will clearly outweigh the absence of any mitigation."

12. "Well, I'd like to cite a few days that they weren't together. February 8th, 1984, when this defendant raped Mary Ann Brison. They weren't together March 3rd, 1984, when this defendant raped and brutalized Candyce Jenkins. They weren't together April 1984 through April 1985 when this defendant was incarcerated."

13. "In addition to that, he says he has difficulty with his motor skills between the right hand and left hand and he's not very good at that. He didn't have any problem grabbing women that I told you about before.

[*109] A prosecutor's conduct does not amount to a constitutional violation unless the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 179, 91 L. Ed. 2d 144,

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Grabbing them with his left hand and the knife in the right hand while he sexually assaulted them."

14. "Now, there was a witness that the State would have wanted to present in this case, but unfortunately we could not call him. Raymond Fife. He would have been able to testify as to what happened that particular day. He would have been able to tell all of us, including this defendant, how he felt when he was abducted and helpless and felt doomed because he had no opportunity to escape. He would have been able to tell us what it felt like to be punched and continually kicked; what it felt like to be strangled so severely that he'd be gasping for breath. He'd be able to describe the pain involved and sexual molestation. He'd also be able to tell you and tell all of us what it would feel like - the indescribable pain when your flesh is burning and you're helpless to do anything about it. And finally, he'd be able to tell us what it would be like to have a stick rammed up your rectal cavity so deeply and so severely that it perforates through the rectum and goes into the urinary bladder. But he's not here to testify about that thanks to this defendant."

"There's some other things that Raymond Fife can't come here and testify about either. He can't testify about how he misses his family, about how he misses his friends in the Scout group, about how he'd like to be with his father in the backyard feeding the birds, how he'd like to be able to live and love and share his love with his family and friends, and he will never be able to do that because of this defendant; this manifestation of evil, this anomaly to mankind, this disgrace to mankind sitting at the end of that table took care of that! And the most commentary about the makeup of this defendant is the manner of the death of Raymond Fife.

106 S. Ct. 2464 (1986), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974); *Webster v. Rees*, 729 F.2d 1078, 1080-81 (6th Cir. 1984). The Sixth Circuit uses a four-part test in determining whether prosecutorial misconduct has caused a denial of due process. The court must consider the degree to which the remarks complained of have a tendency to mislead the jury and prejudice the accused; whether the prosecutor's statements were isolated or extreme; whether they were deliberately placed before the jury; and the strength of the evidence establishing guilt of the accused. *Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990). A prosecutor must have considerable latitude in presenting an argument to a jury and reversal should not occur unless the prosecutor's inappropriate actions resulted in prejudicial error. *Id.* at 670. The most important consideration [*110] is the fairness of the trial, not the culpability of the prosecutor. *Serra v. Michigan Dep't of Corrections*, 4 F.3d 1348, 1355 (6th Cir. 1993), *cert denied*, 510 U.S. 1201 (1994). The prosecutor's misconduct must have a "substantial and injurious effect or influence upon the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993).

This Court has reviewed the statements alleged to have constituted prosecutorial misconduct and finds no prejudicial error. This case was tried before a three judge panel who presumably was able to remember the evidence presented at trial and not be misled by any of the prosecutor's statements. Most of the statements were harmless. In Statement Number 14, the prosecutor predicted what the victim would have said if he could have testified. Again, there was no jury. Three judges should have been able to

disregard any intended undue influence. This Court finds that the prosecutor's conduct did not render Hill's trial unfair or prejudicial.

The Ohio Supreme Court determined that no prejudicial or plain error occurred. In addition, the court noted that in a bench trial in a criminal case, [*111] the court is able to consider only the relevant, material and competent evidence in arriving at its judgment. *State v. Hill*, 64 Ohio St.3d at 330.

The Ohio Supreme Court's decision was not an unreasonable application of clearly established law nor did it result in a decision based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). The Tenth Ground for Relief has no merit.

ELEVENTH GROUND FOR RELIEF

11. Petitioner Hill was denied the effective assistance of counsel at the mitigation phase of his trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

(A) Petitioner Hill was denied effective assistance of counsel when trial counsel failed to have appropriate expert testimony presented at the trial during the mitigation phase.

(B) Trial counsel failed to secure expert assistance that could explain the dynamics of the accused's environment and how it lead him to commit the crime in question.

(C) Trial counsel also failed to secure psychological experts that could explain to the court the various learning problems

> Petitioner had and how this would contribute [*112] to the matter before the court.
>
> (D) By trial counsels' failure to secure appropriate witnesses, Petitioner was denied his right to effective assistance of counsel as guaranteed by the Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution.

The eleventh ground for relief was not raised on direct appeal in the state court but appears to have been presented in post-conviction proceedings to the trial court which found that it could have been raised on direct appeal and was barred by *res judicata*. These contentions do not seem to have been raised in later appeals.[5] In any event, procedural default occurred. The four-part test set forth in *Maupin v. Smith*, 785 F.2d at 138, discussed above in detail applies to this ground. Thus, the Eleventh Ground for Relief does not warrant relief.

TWELFTH GROUND FOR RELIEF

> 12. Petitioner's right to be free from cruel and unusual punishment and his right to due process of law as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution were violated when the Ohio sentencing scheme requires a mandatory sentence of death when a three judge panel

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[5] The Respondent asserts that these issues were contained in Petitioner's eighth ground for relief in post-conviction proceedings before the Ohio appellate court. Examination of the record shows the assertion is not correct.

finds that the aggravating circumstances outweigh the mitigating circumstances.

The petitioner asserts that under Ohio law, if a three judge panel finds that the statutory aggravating factors outweigh mitigating factors beyond a reasonable doubt, the panel must impose a death sentence. This scheme allegedly denies Hill the same sentencing alternatives available to a defendant whose case is tried to a jury. Petitioner argues that the sentencing process must permit consideration of the character and record of the defendant and allow the trier of fact to consider sentencing alternatives. Hill further argues that the three judge panel must make an individualized determination of the appropriateness of the death sentence and not be required to impose the death penalty even though the aggravating circumstances outweigh the mitigating factors. This [*114] argument was raised on direct appeal in the state court, but Hill has not addressed this ground in his proposed findings of fact and conclusions of law. *State v. Hill*, 64 Ohio St.3d at 333.

In *Boyde v. California*, 494 U.S. 370, 377, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990), Boyde argued that the jury must have the freedom to decline to impose the death penalty even if they decide that the aggravating circumstances outweigh the mitigating factors. The Supreme Court determined that the constitution does not require unfettered sentencing discretion in the jury. States may freely enact statutes concerning consideration of mitigating circumstances to achieve more rational and equitable sentences.

The Supreme Court of Ohio found that the Ohio statutes require the sentencing authority to focus on the particular nature of the crime while allowing the accused to present a broad range of specified and unspecified factors in mitigation of the imposition of the death sentence. *State v. Hill*, 64 Ohio St.3d at 333, *citing State v. Jenkins*, 15 Ohio St. 3d at 174. The Supreme Court of Ohio's ruling on the merits was not an unreasonable application [*115] of clearly established law nor did it result in an unreasonable determination of the facts. 28 U.S.C. § 2254(d). Based on *Boyde v. California* and the Ohio Supreme Court's ruling in *State v. Hill*, 64 Ohio St.3d at 333, the Court finds this ground for relief to be without merit.

THIRTEENTH GROUND FOR RELIEF

> 13. When the three judge panel failed to consider to give weight to all of the evidence petitioner presented in mitigation, Hill was denied his constitutional rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

In his brief before the Ohio Supreme Court, Hill stated that the trial court did not consider his possible brain damage, his low mentality and his good institutional record. (Ex. M at 165). The Ohio Supreme Court made a careful review and found that the trial court considered all mitigating factors presented by Hill, and articulated the reason each was outweighed by the aggravating circumstances beyond a reasonable doubt. It concluded that the court complied with R.C. § 2929.03(F). Surely, the Ohio Supreme Court considered the three omissions submitted by Hill in his [*116] brief in making its

determination. Brain damage and low mentality are related. The court considered this point when independently weighing the aggravating circumstances against the mitigating factors. *Id.* at 334. Even if not considered, the fact that Hill had a good institutional record would not make a difference to the court in its determination.

This Court finds that the Ohio Supreme Court's ruling was not an unreasonable application of clearly established law nor did it result in an unreasonable determination of the facts. 28 U.S.C. § 2254(d). The Thirteenth Ground for Relief has no merit.

FOURTEENTH GROUND FOR RELIEF

> 14. Ohio's statutory provisions governing the importance of the death penalty do not meet the prescribed constitutional requirements of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

In proposition of law twenty-four before the Supreme Court of Ohio, Hill argued that the death penalty scheme established in R.C. §§ 2903.01 and 2929.02 *et seq.*, violates the United States and Ohio Constitutions both generally and as applied to the defendant. The Court stated:

> The [*117] specific claims of unconstitutionality by defendant have been rejected by this court in numerous cases. *See, e.g., Jenkins, Buell* and *Lott, supra.* Accordingly, we reaffirm the constitutionality of Ohio's death penalty scheme both facially and as applied to defendant, especially since defendant proffers no compelling reason as to

> why the death penalty scheme is unconstitutional as applied to him. Therefore, we overrule defendant's twenty-fourth proposition of law.

Hill has now submitted to the court various reasons why the Ohio death penalty statutes are unconstitutional. All are without merit.

The United States Supreme Court discussed the constitutionality of the death penalty in *Gregg v. Georgia*, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976). The constitution recognizes the existence of capital punishment. The Fifth Amendment begins, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a Grand Jury ..." *Id.* at 177. The Fourteenth Amendment, enacted at a later time, contemplated capital punishment in stating that "no state shall deprive any person of life, liberty, or property" without due [*118] process of law. *Id.* There are two aspects to consider in determining whether punishment is excessive: The punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime. *Id.* at 173.

The general argument against capital punishment is that standards of decency no longer tolerate it. *Id.* at 179. However, as of 1970, five states had enacted new penalty statutes that have included the factors to be weighed and the procedures to be used in deciding when to impose the death sentence or by making the death penalty mandatory for specific offenses. *Id.* at 179-80. At least, the elected

representatives of the people approve of it. *Id.* at 180-81.

The Supreme Court had held that even though society has accepted capital punishment, it still must agree with the concept of human dignity. *Id.* at 182. The purposes of the death penalty are retribution and deterrence. "Capital punishment is an expression of society's moral outrage at particularly offensive conduct." *Id.* Retribution may no longer be the most important [*119] factor of the death penalty, but it is not inconsistent with human dignity. *Id.* Capital punishment may be appropriate in that society may believe that certain crimes are so grievous an affront to the community that the death sentence may be the only appropriate sanction. *Id.* at 184.

There have been many studies as to whether capital punishment is a deterrent to crime. The results have been inconclusive. *Id.* at 184-85. The Supreme Court opined that the value of deterrence is a matter for the state legislatures which can evaluate the results of the various studies and apply them to local conditions. *Id.* at 186.

Hill argues that the death penalty denies equal protection since it can be arbitrarily applied.

A state may constitutionally impose the death penalty as long as the sentencing authority is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action in imposing sentences." *Zant v. Stephens*, 462 U.S. 862, 874, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983). The aggravating circumstances satisfy this criteria. In *Jurek v. Texas*, 428 U.S. 262, 273, 49 L. Ed. 2d 929, 96 S. Ct. 2950 (1976), the [*120] Supreme Court held

that by narrowing the class of persons eligible for the death penalty through the finding of aggravating circumstances while in consideration of mitigating factors satisfies that criteria. The capital procedures in the State of Texas guided and focused the "jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose the death sentence." *Id.* at 274. In *Proffitt v. Florida*, 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976), the court stated:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, *** the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

In Ohio adequate guidance to prevent arbitrariness is provided by R.C. § 2929.03(D)(2). R.C. § 2929.03(D)(2) provides:

> Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the defender, [*121] arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by

> proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding the jury shall recommend that the offender be sentenced (a) to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

Hill contends Ohio's proportionality review is unconstitutional.

Proportionality review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984). There are various factors which minimize the risk of arbitrary and capricious sentencing [*122] such as bifurcated proceedings, the limited number of chargeable capital crimes, the requirement that at least one aggravating circumstance be found to exist and consideration of a broad range of mitigating circumstances. *State v. Jenkins*, 15 Ohio St.3d 164, 176, 15 Ohio B. 311, 473 N.E.2d 264 (1984), *cert. denied*, 472 U.S. 1032, 87 L. Ed. 2d 643 (1985).

The purpose of proportionality review is to ensure that sentences are not imposed arbitrarily, capriciously and indiscriminately. *Id.* The state of Ohio has a system that enables the Ohio Supreme Court to obtain a vast quantity of information with which to effect proportionality review, including data pertinent to all capital indictments, the sentence

imposed on the defendant, whether or not a plea is entered and whether the indictment or a verdict is imposed by the sentencing authority. *Id. See* R.C. § 2929.021. The Ohio Supreme Court determined that information from a jury is not necessary for the court to decide whether the imposition of a death sentence is disproportionate to sentences imposed for similarly prescribed courses of conduct. *Id. State v. Jenkins*, 15 Ohio St.3d. at 177.

In summary, since [*123] proportionality review is not constitutionally required and Ohio has a satisfactory system to review proportionality, this issue is without merit.

Next, Hill asserts that the requirement that mitigating circumstances be shown by a preponderance of the evidence is unconstitutional. This argument is without merit simply because there is no constitutional requirement that a death penalty scheme contain a particular standard of proof for the consideration of mitigating circumstances. *See Walton v. Arizona*, 497 U.S. 639, 650, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990); *Skaggs v. Parker*, 27 F. Supp. 2d 952, 996-99 (W.D. Ky. 1998). This conclusion satisfies Hill's related contention that this burden of proof prevents the sentencer from considering relevant mitigating factors, or considering the totality of the mitigating circumstances.

Hill complains that failure to require a jury or court to make findings of mitigating circumstances precludes a meaningful review for proportionality purposes.

The United States Supreme Court recently decided that there is no constitutional requirement

that a jury or trial court explain mitigating circumstances in death penalty cases. *Buchanan v. Angelone*, 522 U.S. 269, 139 L. Ed. 2d 702, 118 S. Ct. 757, 761-62 (1998). [*124] As long as the jury knows that it may consider mitigating factors in conjunction with aggravating circumstances when considering the appropriate penalty, there is no constitutional violation. *Id. See Jeffries v. Blodgett*, 5 F.3d 1180, 1196-97 (9th Cir. 1993); *Skaggs v. Parker*, 27 F. Supp. 2d at 997.

Hill next argues that the Ohio death penalty scheme is unconstitutional in that where no mitigation is presented the statute requires a mandatory death sentence. In *Blystone v. Pennsylvania*, 494 U.S. 299, 108 L. Ed. 2d 255, 110 S. Ct. 1078 (1990), the jury at the petitioner's sentencing found one aggravating circumstance, *i.e.*, that petitioner committed a killing while in the perpetration of a robbery. No mitigating circumstances were found. He contended that the mandatory imposition of the death sentence violated the Eighth Amendment requirement of individualized sentencing since the jury was precluded from considering whether the severity of his aggravating circumstances warranted the death penalty. *Id.* at 306. The court held that the Eighth Amendment does not require that aggravated circumstances be further refined or weighed by [*125] a jury. Furthermore, the presence of aggravating circumstances limits the class of death eligible defendants. *Id.* at 306-07.

The same reasoning can be applied to Hill's assertion that the Ohio scheme impermissively devalues the importance of mitigation because no

method exists to ensure that proper weighing and consideration of the evidence occurs.

Ohio Revised Code § 2929.03(D)(2) requires the trial jury to determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances found outweigh the mitigating factors, the jury must recommend to the court imposition of the death sentence. If such a finding is not found, life imprisonment with or without parole is recommended.

In *Proffitt*, 428 U.S. at 257, the Court recognized that while weighing aggravating circumstances with mitigating factors may be hard, they require nothing more than is commonly required of a fact finder in a lawsuit. The various factors needed to be considered [*126] do not have numerical weights assigned to them but the jury's discretion is guided by requiring examination of specific factors that support or oppose the death penalty. Arbitrariness and capriciousness are thereby eliminated. The provisions of the Ohio statutes are sufficiently construed to provide a method of proper weighing and consideration of the evidence.

Hill argues that the Ohio death penalty statutes are unconstitutional in that they fail to require the conscious desire to kill or premeditation and deliberation before a death sentence can be imposed. In his brief before the Ohio Supreme Court, Hill refers to R.C. § 2903.01(B) and R.C. § 2929.04(A)(7) as being deficient in this regard.

Ohio Revised Code § 2903.01(B) provides in pertinent part:

> No person shall purposely cause the death of another ... while committing or attempting to commit ... kidnaping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

Ohio Revised Code § 2929.04(A)(7) provides for imposition of the death penalty if the offense was committed while the offender was committing or attempting [*127] to commit kidnaping, rape, aggravated arson, aggravated robbery or aggravated burglary and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

Purposely is an element of aggravated murder. A person acts purposely when it is his intention to cause a certain result. Therefore, in order for an individual to be found guilty of aggravated murder, he must have had a specific intent to kill. "Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result." Ohio Jury Instructions Section 409.01.

The offense referred to in R.C. § 2929.04(A)(7) is aggravated murder, prohibited in R.C. § 2903.01(B). The latter statute is not applicable until the defendant is found guilty of the prior statute which requires the conscious desire to kill. Only five felonies under R.C. § 2903.03(B) qualify for the death penalty under R.C. § 2929.04(A)(7) and, in addition, the defendant must be the principal offender or have acted with prior calculation and design. The

principal offender is the perpetrator of the crime. If the defendant [*128] is not the principal offender or did not act with prior calculation and design, then the death penalty would not be imposed and failure to include a conscious desire to kill is inconsequential. All of Hill's contentions in Ground Fourteen are without merit.

FIFTEENTH AND SIXTEENTH GROUNDS FOR RELIEF

> 15. Appellant's death sentence was imposed in violation of his rights to due process and freedom from cruel and unusual punishment as encompassed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution when the three judge panel improperly considered non-statutory aggravating factors.
>
> 16. Petitioner Hill was denied his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution when the court on appellate review of his sentence, considered non-statutory aggravating factors.

These two related grounds for relief were raised on direct appeal in the state courts.[6] The issues were rejected by the United States Supreme Court. A death sentence may not be based on a sole nonstatutory aggravating factor. *Barclay v. Florida*, 463 U.S. 939, 966, 77 L. Ed. 2d 1134, 103 S. Ct. 3418 (1983). Consideration at the sentencing [*129] phase

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[6] These issues were mentioned as part of Hill's brief in Proposition of Law 25 in the Ohio Supreme Court.

of information not directly related to either statutory aggravating or statutory mitigating factors is appropriate as long as that information is relevant to the character of the defendant or the circumstances of the crime. *Id.* The United States Supreme Court stated in *Zant v. Stephens:*

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.

462 U.S. at 879; *See Skaggs v. Parker,* 27 F. Supp. 2d at 998.

[*130] Hill complains that the Ohio court of appeals improperly examined a nonstatutory aggravating circumstance when it considered his character as an aggravating circumstance. Even if Hill's character was considered an aggravating circumstance, other aggravating circumstances existed as Hill was found guilty of kidnaping and rape, aggravating circumstances set forth in R.C. § 2929.04(A)(7). Grounds Fifteen and Sixteen are without merit.

SEVENTEENTH, EIGHTEENTH, TWENTY-SIXTH AND TWENTY-SEVENTH GROUNDS FOR RELIEF

> 17. Petitioner Hill was deprived of having a full and fair evidentiary hearing in state post-conviction proceedings as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.
>
> 18. The Ohio state courts have effectively converted Ohio' post-conviction procedure into a meaningless ritual, rather than the statutorily mandated process for those convicted of a criminal offense to obtain redress for violations of their rights under the Ohio Constitution and the constitution of the United States. As a result, Petitioner was denied his rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States [*131] Constitution.
>
> 26. Petitioner was denied his right to expert assistance upon collateral review of his convictions in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.
>
> 27. Petitioner was denied his rights as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution when his request for expert assistance in his post-conviction petition to reexamine the dental evidence was denied.

The Constitution does not require a state to provide a means of post-conviction relief. *Pennsylvania v. Finley*, 481 U.S. 551, 557, 95 L. Ed.

2d 539, 107 S. Ct. 1990 (1987). An error in a state post-conviction proceeding does not raise a constitutional issue and is not cognizable in a federal habeas corpus action. *Gee v. Groose*, 110 F.3d 1346, 1351-52 (8th Cir. 1997); *Tokar v. Bowersox*, 1 F. Supp.2d 986, 1015 (E.D. Mo. 1998).

A state is not required to provide a system for appeal, but if it does so, the appeal must comply with the basic requirements of due process. *Evitts v. Lucey*, 469 U.S. 387, 393, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985). This reasoning was held to apply to further proceedings [*132] provided by the state, *i.e.*, discretionary appeals, post-conviction remedies and clemency procedures. *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178, 1186 (6th Cir. 1997).

Habeas corpus is available when a petitioner is in custody and the detention is related to a constitutional violation. *Kirby v. Dutton*, 794 F.2d 245, 246 (6th Cir. 1986). A defendant challenging the fact or duration of his imprisonment and seeking immediate release would be limited in his federal remedies to habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973).

In *Kirby v. Dutton*, 794 F.2d at 246, Kirby claimed that he was denied effective assistance of counsel in the post-conviction proceedings as well as his rights to equal protection and due process of law. *Id.* Kirby's claims were held to be unrelated to his detention. Ruling in Kirby's favor would not have resulted in a reduction in his sentence or in any way affect his detention. *Id.* at 247. So habeas corpus was not available to him.

Hill is challenging a proceeding collateral to his detention and not the detention itself. Even if [*133]

the court erred in the post-conviction proceedings, he would not be entitled to habeas corpus relief. *See Steele v. Young,* 11 F.3d 1518 (10th Cir. 1993); *Hopkinson v. Shillinger,* 866 F.2d 1185 (9th Cir. 1989). Therefore, Grounds Seventeen, Eighteen, Twenty-six and Twenty-seven are without merit.

TWENTY-FIRST GROUND FOR RELIEF

> 21. The admission of other crimes, wrongs or acts allegedly committed by the petitioner into evidence at petitioner's trial violated the due process clause of the United States Constitution and therefore denied Hill his rights as guaranteed by same.

This ground concerns the testimony of Stephen Melius, a witness called by the State. Melius testified that he had been incarcerated in the same cell as Hill in late January or early February 1984 at the juvenile center in Trumbull County. He stated that he was approached by Hill and asked to engage in oral and anal sex but no physical contact was initiated. This testimony was introduced to show that petitioner would engage in sex acts with a male. There was no evidence that sex occurred. Hill alleges that the testimony was clearly irrelevant and its only purpose [*134] was to influence the passions of the three judge panel.

This ground was presented on direct appeal to the state courts. The testimony of two other witnesses was involved. The Ohio Supreme Court ruled that Melius also stated that the defendant (Hill) put his hand on him and expressed a desire to perform anal intercourse and fellatio on him. Melius testified that he refused both the defendant's advances and the

invitation to perform anal intercourse and fellatio with defendant.

The state court relied on Ohio Rule of Evidence 404(B) which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The state court also referred to R.C. § 2945.59 which provides as follows:

> In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show [*135] his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

In *State v. Jamison*, 49 Ohio St.3d 182, 552 N.E.2d 180 (1990), *cert. denied*, 498 U.S. 881, 112 L. Ed. 2d 183 (1990), the court held as stated in the syllabus:

> Other acts forming a unique, identifiable plan of criminal activity are admissible to establish

> identity under Evid. R. 404(B). To be admissible these other acts must tend to show by substantial proof "identity" or other enumerated purposes under Evid. R. 404(B). Although the standard for admissibility is strict, the other acts need not be the same as or similar to the crime charged ...

Melius's testimony shows the defendant's motive to forcibly have sex with another male.

In an abundance of caution the Ohio Supreme Court further determined that even if admission of the testimony was improper, the fact that it was tried before a three judge panel requires that [*136] it must affirmatively appear on the record that the panel relied on the alleged improper testimony. *State v. Post*, 32 Ohio St.3d 380, 384, 513 N.E.2d 754 (1987), *cert. denied*, 484 U.S. 1079 (1988). The court found that since the trial panel stated in its opinion weighing the aggravating circumstances against the mitigating factors that "no prior crimes were considered by the court in any way in reaching its verdict," the defendant was not prejudiced. *State v. Hill*, 64 Ohio St. 3d at 322-23.

Habeas corpus review is not available to determine the propriety of state court rulings on the admissibility of evidence unless the trial is rendered fundamentally unfair. *Moore v. Tate*, 882 F.2d 1107, 1109 (6th Cir. 1989). In a nonjury trial there is a presumption that the improper evidence, taken under objection, was given no weight by the trial judge and only properly admitted and relevant evidence was used by the court in making its decision. *United States v. McCarthy*, 470 F.2d 222, 224 (6th Cir. 1972). The Ohio Supreme Court's

conclusion was similar. For the above reasons, this Court finds that Ground Twenty-one is without [*137] merit.

TWENTY-SECOND GROUND FOR RELIEF

> 22. When the state failed to prove by proof beyond a reasonable doubt and the three judge panel failed to specifically find that Petitioner had the specific intent to kill Raymond Fife, Petitioner's conviction and death sentence were in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

Ohio Revised Code § 2903.01(D) provides that no person shall be convicted of aggravated murder unless he is found to have intended to cause the death of another. The Ohio Supreme Court held that this provision does not require the finder of fact to make a special finding of specific intent at the guilty phase of the trial. *State v. Maurer*, 15 Ohio St.3d 239, 247-48, 15 Ohio B. 379, 473 N.E.2d 768 (1984), *citing State v. Jenkins*, 15 Ohio St.3d at 212-13.

The purpose of R.C. § 2903.01(D) is to ensure that defendants were not sentenced to death even though they did not participate in the actual killing, lacked the specific intent to kill, and acted only as aiders and abettors to crimes other than murder. *State v. Jenkins*, 15 Ohio St.3d at 212.

This is a matter of state procedure which [*138] concerns state law involving no federal question of fundamental fairness or constitutional protection. *Gemmel v. Buchkoe*, 358 F.2d 338, 340 (6th Cir. 1965), *cert. denied*, 385 U.S. 962, 17 L. Ed. 2d 306, 87 S. Ct. 402 (1966). A federal court does not act as a state court of appeals to review a state court's

interpretation of its own procedure. *Allen v. Morris,* 845 F.2d 610, 614 (6th Cir. 1988), *cert. denied,* 488 U.S. 1011, 102 L. Ed. 2d 790 (1989). Relief is not warranted for the Twenty-second Ground.

TWENTY-THIRD GROUND FOR RELIEF

> 23. Petitioner Hill was denied his right to a fair trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution when the Court permitted the admission of gruesome, repetitive and cumulative photographs.

Thirty-three photographs of the victim's body were admitted into evidence during the fact finding phase of Hill's trial. He contends that the inflammatory and cumulative nature of the photographs outweighed any probative value. The three judge panel utilized the photographs in determining that the aggravating circumstances outweighed the mitigating [*139] factors. A carry-over effect allegedly resulted causing the court's decision to be based on caprice or emotion rather than reason.

Hill raised this issue on direct appeal in the state courts. Habeas corpus review is not available to determine the propriety of state court rulings on the admissibility of evidence unless the trial is rendered fundamentally unfair. *Moore v. Tate,* 882 F.2d at 1109. In determining whether the admission of certain evidence violated a defendant's constitutional rights, the court must determine if the evidence is relevant or probative of an issue in which the prosecution has the burden of proof. *Skaggs v. Parker,* 27 F. Supp.2d at 985-86, *citing Estelle v. McGuire,* 502 U.S. 62, 69-70, 116 L. Ed. 2d 385, 112

S. Ct. 475 (1991). If the evidence is relevant to an issue in the case, it must be deemed properly admitted as far as constitutional rights are concerned. *Id.*

The Ohio Supreme Court utilized *State v. Maurer*, 15 Ohio St.3d at 266 wherein the court stated:

> ... properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting [*140] the trier of fact to determine the issues or are illustrative of testimony and other evidence, as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number.

The Ohio court found that the probative value of the photographs outweighed any prejudicial effect. Since the case was tried to a three judge panel the outcome would not have been different even if the gruesome photographs were not admitted. *State v. Hill*, 64 Ohio St.3d at 328.

The photographs of the victim in the present case were certainly relevant. The record shows that they were used to support the testimony of the expert witness. This Court agrees with the Ohio Supreme Court's determination that admittance of the photographs did not render the trial unfair. The Twenty-third Ground for Relief is without merit.

TWENTY-FOURTH GROUND FOR RELIEF

> 24. Petitioner's rights as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution were violated when

> without probable cause he was transported to the Warren Police Department when no prior judicial authorization had been [*141] given.

Hill failed to raise this precise ground in the state courts. In ground one of this habeas corpus action, Hill argued that he was induced through coercion and psychological ploys to go to the police station. The United States Supreme Court determined in *Anderson v. Harless*, 459 U.S. 4, 6, 74 L. Ed. 2d 3, 103 S. Ct. 276 (1982), that 28 U.S.C. § 2254 requires a petitioner to provide the state courts with a fair opportunity to apply federal legal principles to the facts constituting his constitutional claim. The petitioner must have fairly presented the substance of his federal habeas corpus claim to the state courts. *Id.*

The facts presented to the state courts and before this Court in ground one are not the same as the facts and issues before the Court in this ground. Thus, Hill's allegations in ground twenty-four constitute a constitutional violation separate and distinct from the constitutional violations asserted on direct appeal in the state courts. Because this issue was not raised in the state courts, it is procedurally barred pursuant to *Maupin v. Smith*, 785 F.2d at 135. Ground Twenty-four does not warrant relief.

[*142] TWENTY-FIFTH GROUND FOR RELIEF

> 25. Petitioner Hill was denied his constitutional rights to a fair trial and due process of law when the trial court granted the prosecution's motion to quash several subpoenas of witnesses subpoenaed to testify regarding the arbitrary fashion by which the decision was made to seek the death penalty in

> Trumbull County, Ohio in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This ground was not raised in any manner in the state courts. Based on *Maupin v. Smith*, 785 F.2d at 135, the Court finds ground twenty-five has been procedurally defaulted.

The United States Supreme Court has ruled that the death penalty is not unconstitutional merely because of opportunities for discretionary action inherent in the processing of a murder case. *Gregg v. Georgia*, 428 U.S. at 199 (1976). There are several ways discretion is inherent in a murder case besides the decision to seek the death penalty. The prosecutor has the authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. *Id.* The jury may decide to convict a [*143] defendant of a lesser included offense rather than find him guilty of a crime punishable by death. A defendant who is convicted and sentenced to die may have his sentence commuted by the governor of the state. *Id.* Arbitrariness may occur at each of these stages. Furthermore, the decision to impose the death penalty on a capriciously selected group of offenders is guided by certain standards requiring that sentencing be focused on the circumstances of the crime and the defendant. *Id.* A prosecutor's decision must also be based on standards set forth in the Ohio death penalty statutes which have been found constitutional. *State v. Jenkins, supra.* Therefore, Ground Twenty-five is without merit.

TWENTY-EIGHTH GROUND FOR RELIEF

> 28. Petitioner was denied his rights in violation of the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution when the three judge panel failed to specifically find that Appellant was the principal offender and/or that he acted with prior calculation and design.

The three judge panel found Hill guilty of aggravated murder and indicated the offense was committed while he was committing aggravated arson, [*144] rape and kidnaping and found that Hill was either the principal offender or, if not the principal offender, committed the aggravated murder with prior calculation and design. The court failed to specify whether they were unanimously finding that he was the principal offender, or that he committed the murder with prior calculation and design or they were unable to come to a unanimous finding.

Hill did not pursue this ground on direct appeal in the state courts. However, he presented it as his first subargument in post-conviction proceedings before the state court of appeals. The court found that he did not provide any citation or authority to support his position nor did he advance any reasoning to advocate this premise. Furthermore, as the matter was tried to a three judge panel, the court assumed regularity or lack of prejudicial error. Finally, the court held that this issue could have been raised on direct appeal and was barred by res judicata. *State v. Hill*, 1995 Ohio App. LEXIS 2684, 1995 WL 418683 at *2 (Ohio App. 11th Dist.)

Ground twenty-eight has been procedurally defaulted. The four-part test set forth in *Maupin v.*

Smith, 785 F.2d at 135, discussed above in detail, [*145] applies.

The trial court stated in its sentencing decision:

> ... The court found little credible evidence as to which co-defendant initiated the series of crimes involved. In any event, whoever may first have taken the victim from the bike before all the events ended, both participants have followed a blood lust characterized by a series of acts of torture, rape and murder to such an extent that the question of who started them was viewed as essentially irrelevant.

This statement sufficiently explains the court's ruling as to whether it found Hill to be a principal offender or to have acted with prior calculation and design. Little evidence was produced on the question of prior calculation and design. Both participants performed the series of acts of torture, rape and murder so that prior calculation and design was not an issue. Principal offender is defined as one who directly caused the death. Two individuals can be a principal offender when they act together to perform every act that causes the death with the intent to cause death. *State v. Frank*, 1998 Ohio App. LEXIS 4756, 1998 WL 696777 at *6 (Ohio App. 9th Dist.). The conclusion is that the court in Hill's case determined [*146] that he was a principal offender. Therefore, the Twenty-eighth Ground does not warrant relief.

CONCLUSION

For the above reasons, Hill's petition for writ of habeas corpus is DENIED The stay of execution is VACATED. The action is hereby DISMISSED.

The Court finds, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal can be taken in good faith as to the First, Second, Third, Eighth, Ninth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-sixth and Twenty-seventh Grounds for Relief and hereby issues a certificate of appealability as to those issues. The Court further finds that the petitioner has not made a substantial showing of the denial of a constitutional right or that an appeal could be taken in good faith as to the remaining issues and will not issue a certificate of appealability as to those issues. 28 U.S.C. § 2253(c).

The Clerk of Court shall send a copy of this Memorandum of Opinion and Order to Patricia A. Millhoff, Esq., 80 Bowery Street # 106, Akron, Ohio 44308; George C. Pappas, Esq., 159 S. Main Street, 423 Society Building, Akron, Ohio 44308; and Charles L. Wille, Esq., Assistant Attorney General, Capital Crimes [*147] Section, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215-3428

IT IS SO ORDERED.

09-29-99

JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

JUDGMENT ENTRY

Pursuant to this Court's Memorandum of Opinion and Order filed contemporaneously with this Judgment Entry,

It is ordered that the Petition for Writ of Habeas Corpus is denied. The stay of execution is vacated. The action is dismissed. Further, the Court finds, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal can be taken in good faith as to the First, Second, Third, Eighth, Ninth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-sixth and Twenty-seventh Grounds for Relief and hereby issues a certificate of appealability as to those issues. The Court further finds that the petitioner has not made a substantial showing of the denial of a constitutional right or that an appeal could be taken in good faith as to the remaining issues and will not issue a certificate of appealability as to those issues. 28 U.S.C. § 2253(c).

The Clerk of Court shall send a copy of this Judgment Entry to Patricia A. Millhoff, Esq., 80 Bowery Street, Akron, Ohio 44308; George [*148] C. Pappas, Esq., 159 S. Main Street, 423 Society Building, Akron, Ohio 44308; and Charles L. Wille, Esq., Assistant Attorney General, 30 East Broad Street-26th Floor, Columbus, Ohio 43215-3428.

IT IS SO ORDERED.

09-29-99

JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX F

STATE v. HILL

Supreme Court of Ohio

August 26, 2009, Decided

No. 2008-1686

OPINION

APPEAL NOT ACCEPTED FOR REVIEW

Pfeifer, J., dissents.

Lanzinger, J., dissents and would accept the appeal on Proposition of Law Nos. I and II.

APPENDIX G

STATE v. HILL

Court of Appeals of Ohio,
Eleventh Appellate District,
Trumbull County

July 11, 2008, Decided

Case No. 2006-T-0039

COUNSEL: Dennis Watkins, Trumbull County Prosecutor, and LuWayne Annos, Assistant Prosecutor, Warren, OH (For Plaintiff-Appellee).

Michael J. Benza, Chagrin, Falls, OH (For Defendant-Appellant).

Jillian S. Davis, Towards Employment, Inc., Cleveland, OH (For Defendant-Appellant).

JUDGES: DIANE V. GRENDELL, P. J.[,] MARY JANE TRAPP, J., concurs, COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

OPINION BY: DIANE V. GRENDELL

OPINION

[*176] [***111] DIANE V. GRENDELL, P. J.,

[**P1] Defendant-appellant, Danny Lee Hill, appeals the judgment of the Trumbull County Court of Common Pleas denying his petition for post-conviction relief. For the following reasons, we affirm the decision of the court below.

[**P2] On September 10, 1985, twelve-year-old Raymond Fife was found brutalized in a field near his home in Warren, Ohio. Raymond died two days later. In September 1985, Hill and an accomplice, Timothy Combs, were indicted for the crime. In 1986, Hill was found guilty, by a three-judge panel in the Trumbull County Court of Common Pleas, of the following charges:

> Aggravated Murder with Specifications of Aggravating Circumstances, Kidnapping, Rape, Aggravated Arson, and [****2] Felonious Sexual Penetration.

[**P3] On February 26, 1986, a mitigation hearing was held to determine whether the death penalty would be imposed for Raymond's murder. The three-judge panel "considered the following factors in possible mitigation: 1) The age of the defendant; 2) The low intelligence of the defendant; 3) The poor family environment; 4) The failure of the State or society to prevent this crime; 5) The defendant's impaired judgment; 6) Whether or not he was a leader or follower." The three-judge panel concluded that "the aggravating circumstances in this case outweigh the mitigating factors beyond a reasonable doubt."

[**P4] On March 5, 1986, Hill was sentenced to the following: death for Aggravated Murder; imprisonment for an indeterminate period of ten to twenty-five years for Kidnapping; imprisonment for determinate period of life for Rape; imprisonment for an indeterminate period of ten to twenty-five years [***112] for Aggravated Arson; and imprisonment for a determinate period of life for Felonious Sexual Penetration.

[**P5] Hill's convictions and sentence were upheld on appeal by this court. *State v. Hill* (Nov. 27, 1989), 11th Dist. No. 3720, 3745, 1989 Ohio App. LEXIS 4462. In our review of [****3] the appropriateness of imposing the death penalty, this court noted: "The record is replete with competent, credible evidence which states that appellant has a diminished mental capacity. He is essentially illiterate, displays poor word and concept recognition and, allegedly, has deficient motor skills. Appellant is characterized as being mildly to moderately retarded. There is some suggestion that appellant's 'mental age' is that of a seven to nine year old boy. Testimony places appellant's I.Q. between 55 and 71, which would cause him to be categorized as mildly to moderately retarded." Id. at *88. This court [*177] affirmed the conclusion that the evidence of low intelligence and impaired judgment were not significant mitigating factors. "Consideration of evidence delineating appellant's mental retardation is more properly applied when evaluating his ability to knowingly, intelligently and voluntarily waive his constitutional rights. There is no evidence presented that requires the conclusion that this crime was committed because a mental defect precluded appellant from making the correct moral or legal choice." Id. at *90.

[**P6] Hill appealed his case to the Ohio Supreme Court, which, in accordance [****4] with R.C. 2929.05(A), independently reviewed the record to determine "that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case."

[**P7] The Supreme Court acknowledged that Hill's "mental retardation is a possible mitigating factor." *State v. Hill*, 64 Ohio St.3d 313, 335, 1992 Ohio 43, 595 N.E.2d 884. The court summarized the testimony of the psychologists who testified during the mitigation phase of Hill's trial:

> [**P8] Dr. Douglas Darnall, a psychologist, testified that defendant had an I.Q. of 55 and that his intelligence level according to testing fluctuates between mild retarded and borderline intellectual functioning, and that he is of limited intellectual ability. Dr. Darnall did state, however, that defendant was able to intellectually understand right from wrong.
>
> [**P9] Dr. Nancy Schmidtgoessling, a clinical psychologist, testified that defendant had a full scale I.Q. of 68, which is in the mild range of mental retardation, and that the defendant's mother was also mildly retarded. Dr. Schmidtgoessling also testified that defendant's moral development level was "primitive," [****5] a level at which "one do[es] things based on whether you think you'll get caught or whether it feels good. [T]hat's essentially whereabout *[sic]* a 2-year old is."
>
> [**P10] Dr. Douglas Crush, another psychologist, testified that defendant had a fullscale I.Q. of 64, and that his upper level cortical functioning indicated very poor efficiency.

[**P11] *Id.* at 334-335.

[**P12] Having reviewed this testimony, the Supreme Court found "a very tenuous relationship

between the acts he committed and his level of mental retardation." *Id.* at 335. "When considering the manner in which the victim was kidnapped and killed; the rape, burning, strangulation and torture the victim endured," the court concluded "these aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt" [***113] and affirmed the sentence of death. *Id.*

[**P13] [*178] In 2002, the United States Supreme Court held that the execution of mentally retarded criminals violates the Eighth Amendment's ban on cruel and unusual punishments. *Atkins v. Virginia* (2002), 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335. In *State v. Lott*, 97 Ohio St.3d 303, 2002 Ohio 6625, 779 N.E.2d 1011, the Ohio Supreme Court addressed the implications of the *Atkins* decision on the execution of capital punishment in Ohio. The court [****6] adopted three criteria for establishing mental retardation, based on clinical definitions approved in *Atkins*: "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." *Id.* at P12. The court further held that, "[w]hile IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue" and "there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70." *Id.*

[**P14] On January 17, 2003, Hill filed a Petition to Vacate Danny Hill's Death Sentence Pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L. Ed. 2d 335 (2002), *State v. Lott*, 97 Ohio St.3d 303,

2002 Ohio 6625, 779 N.E.2d 1011 (2002), and Ohio Revised Code § 2953.21. Hill asserted that his mental retardation is "a fact of record in his case," and that the State is thereby "barred by the doctrine of collateral estoppel from any attempt to relitigate the proven fact that [Hill] is a person with mental retardation." In the alternative, Hill argued the trial court should take judicial notice of the fact that he is a person with mental [****7] retardation and/or hold a hearing on the issue of his mental retardation.

[**P15] On April 4, 2003, the trial court ruled that Hill's petition stated "substantive ground for relief sufficient to warrant an evidentiary hearing." The court granted the State and Hill's requests to retain their own experts in the field of mental retardation. Over Hill's objection, the court determined to retain its own expert to evaluate Hill "pursuant to his *Atkins* claim." The court denied Hill's request to have a jury empanelled to adjudicate his *Atkins* claim.

[**P16] The State retained as its expert Dr. J. Gregory Olley, a professor at the University of North Carolina at Chapel Hill and a director of the university's Center for the Study of Development and Learning. Hill retained as his expert Dr. David Hammer, a professor at the Ohio State University and the director of psychology services at the university's Nisonger Center. The court, through the Forensic Center of Northeast Ohio, retained Dr. Nancy Huntsman, of the Court Psychiatric Clinic of Cleveland.

[**P17] In April 2004, Drs. Olley, Hammer, and Huntsman evaluated Hill at the Mansfield Correctional Institution for the purposes of preparing

for the *Atkins* hearing. At [****8] this time, Hill was administered the Weschler Adult Intelligence Scale (WAIS-III) IQ test, the Test of Mental Malingering, the Street Survival [*179] Skills Questionnaire, and the Woodcock-Johnson-III. The doctors concurred that Hill was either "faking bad" and/or malingering in the performance of these tests. As a result, the full scale IQ score of 58 obtained on this occasion was deemed unreliable and no psychometric assessment of Hill's current adaptive functioning was possible. Thus, the doctors were forced to rely on collateral sources in reaching their conclusions, such as Hill's school records containing evaluations of his intellectual functioning, evaluations performed at the [***114] time of Hill's sentencing and while Hill was on death row, institutional records from the Southern Ohio Correctional Institution and the Mansfield Correctional Institution, interviews with Hill, corrections officers and case workers, and prior court records and testimony.

[**P18] The evidentiary hearing on Hill's *Atkins* petition was held on October 4 through 8 and 26 through 29, 2004, and on March 23 through 24, 2005. Doctors Olley and Huntsman testified that, in their opinion, Hill is not mentally retarded. Doctor Hammer [****9] concluded that Hill qualifies for a diagnosis of mild mental retardation.

[**P19] In the course of the trial, an issue arose regarding the interpretation of the results of the Vineland Social Maturity Scale test, a test designed to measure adaptive functioning and performed on Hill four times prior to the age of eighteen. Hill presented the testimony of Sara S. Sparrow, Ph.D, professor emerita of Yale University, to rebut certain

opinions expressed by Dr. Olley. In turn, the State called Timothy Hancock, Ph.D., executive director of the Parrish Street Clinic, in Durham, North Carolina, as a surrebuttal witness to Dr. Sparrow.

[**P20] The following lay persons also testified at the hearing regarding Hill's functional abilities: Corrections Officer John Glenn, Death Row Case Manager Greg Morrow, Death Row Unit Manager Jennifer Sue Risinger, and Corrections Officer Steven Black.

[**P21] On November 30, 2005, Hill filed a Petitioner's Supplemental Authority and Renewed Double Jeopardy Motion, in which he asserted that the State is barred by the doctrine of collateral estoppel and Double Jeopardy Clause from re-litigating the issue of his mental retardation.

[**P22] On February 15, 2006, the trial court issued its Judgment [****10] Entry denying Hill's petition for post-conviction relief on the grounds that he is a person with mental retardation and rejecting his arguments regarding Double Jeopardy/collateral estoppel.

[**P23] On March 15, 2006, Hill filed a timely notice of appeal to this court.

[**P24] On August 21, 2006, Hill, acting pro se, filed a motion to withdraw merit brief filed by counsel, and request that this court would order a competency hearing to determine whether Hill is competent to waive all appeals [*180] and proceedings in this matter. The basis for the motion is that appointed counsel had filed a merit brief in this appeal without properly investigating Hill's "'Atkins' claims and/or constitutional violations."

[**P25] On October 27, 2006, this court issued the following judgment entry: "The trial court is directed to promptly hold an evidentiary hearing to determine Appellant's competency to make decisions regarding his counsel and possible waiver of the right to appeal. Depending upon the outcome of that determination, the trial court shall further determine whether Appellant has actually decided to waive his right to proceed in the appeal; and whether that decision has been made voluntarily, knowingly [****11] and intelligently."

[**P26] The trial court appointed Thomas Gazley, Ph.D., with the Forensic Psychiatric Center of Northeast Ohio, to evaluate Hill. Dr. Gazley interviewed Hill on two occasions in November 2006. On December 7, 2006, a hearing was held on the competency issue.

[**P27] On December 8, 2006, the trial court issued a Judgment Entry finding that Hill is "competent to make a decision whether or not to pursue an appeal" and has, "in open court," expressed his desire to pursue an appeal from the adverse decision [***115] of the trial court on the issue of mental retardation.

[**P28] On February 1, 2007, this court overruled Hill's Motion to Withdraw Merit Brief Filed by Counsel, and Request that this Court Would Order a Competency Hearing as moot.

[**P29] On appeal, Hill raises the following assignments of error:

> [**P30] "[1.] The Trial Court Erred in failing to Apply Double Jeopardy and *Res Judicata* Doctrines to Prevent Renewed Litigation of

Mr. Hill's Status as a Person with Mental Retardation."

[**P31] "[2.] The Trial Court Erred in Denying Mr. Hill a Jury Determination of his Mental Retardation Status and Not Imposing the Burden of Proof on the State of Ohio to Prove the Absence of Mental Retardation Beyond a Reasonable Doubt."

[**P32] [****12] "[3.] The Trial Court Erred in Finding that Mr. Hill Was Not a Person with Mental Retardation."

[**P33] "[4.] The Trial Court Erred in Determining Mr. Hill was Competent to Proceed with this Appeal."

[**P34] Under the first assignment of error, Hill argues that relitigation of the issue of his mental retardation is barred by the Double Jeopardy Clause of the Fifth Amendment and by the doctrine of res judicata/collateral estoppel. Hill cites to several cases in which the fact of his mental retardation has allegedly been judicially determined. *Hill,* 1989 Ohio App. LEXIS 4462, at *16 ("[a]ppellant, [*181] in the case at bar, admittedly suffers from some mental retardation"); *Hill,* 64 Ohio St.3d at 335 ("we find that defendant's mental retardation is a possible mitigating factor").

[**P35] Collateral estoppel is one aspect of the doctrine of res judicata, and precludes the relitigation in a second action of an issue or issues that have been "actually and necessarily litigated and determined in a prior action." *Goodson v. McDonough Power Equipment, Inc.* (1983), 2 Ohio St.3d 193, 195, 2 Ohio B. 732, 443 N.E.2d 978, citing

Whitehead v. Gen. Tel. Co. (1969), 20 Ohio St.2d 108, 112, 254 N.E.2d 10; *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 1995 Ohio 331, 653 N.E.2d 226. *Cf. Ashe v. Swenson* (1970), 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 [****13] (collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit").

[**P36] "Collateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action." *Thompson v. Wing*, 70 Ohio St.3d 176, 183, 1994 Ohio 358, 637 N.E.2d 917, citing *Whitehead*, 20 Ohio St.2d 108, 254 N.E.2d 10, at paragraph two of the syllabus.

[**P37] Application of the doctrine of res judicata/collateral estoppel to a particular issue is a question of law. *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 174 Ohio App.3d 135, 2007 Ohio 6594, at P41, 881 N.E.2d 294. Accordingly, it is reviewed under a de novo standard of review, i.e. without deference to the lower court's decision. *Rossow v. Ravenna*, 11th Dist. No. 2001-P-0036, 2002 Ohio 1476, at P7.

[**P38] The lower court, in considering this issue, began with the premise that *Atkins* and *Lott* created a new standard and a new procedure for determining whether [****14] a capital offender's mental retardation [***116] barred his execution. The court observed that Hill's "earlier claims of mental

retardation (during the pre-trial and trial phases of the underlying case) related to voluntariness of statements, waiver of counsel at an investigatory stage, and waiver of *Miranda* rights." With respect to the Eighth Amendment, however, the issue of mental retardation has "constitutional dimensions and constitutional imperatives" which distinguish it from the myriad of different contexts in which it has previously been considered. Thus, mental retardation "has been scientifically, psychologically, and artfully (in the legal sense) defined in fresh light." Cf. *Lott*, 97 Ohio St.3d at 306 ("*Atkins* established the new standard for mental retardation"). [*182] On this basis, the lower court concluded that, for Hill, the issue of mental retardation is being litigated for the first time.

[**P39] Our analysis focuses on the first element of collateral estoppel: whether the issue of Hill's mental retardation "was actually and directly litigated in the prior action." We hold that the issue of Hill's mental retardation was not "actually and directly litigated" at his sentencing hearing because [****15] the finding that he was mentally retarded was not essential to the imposition of the death penalty in the same way that it is essential in the *Atkins/Lott* context.

[**P40] Hill maintains "the issue of mental retardation was essential to his argument against the imposition of the death penalty." Hill relies on the Sixth Circuit's decision in *Bies v. Bagley* (C.A.6

2008), 519 F.3d 324, decided during the pendency of this appeal.[1]

[**P41] In *Bies*, the Sixth Circuit concluded the determination that an offender is mentally retarded during the penalty phase is a "necessary" finding because, under Ohio law, "a sentencing court may not impose the death penalty unless that court has first considered any mitigating factors weighing against a death sentence, *** and found those mitigating factors proven by a preponderance of the evidence." *Id.* at 336; R.C. 2929.04(B). "[B]ecause a sentencing court's inquiry is open-ended, determining [****16] which mitigating factors are actually present in a case is a necessary first step to determining whether those factors outweigh the aggravating circumstances." 519 F.3d at 337.

[**P42] We disagree. The fact that the sentencing court in a capital case must weigh potential mitigating factors against the aggravating circumstances does not mean that a finding that an offender is, or is not, mentally retarded constitutes a necessary finding for the imposition of the death penalty. Rather, the contrary is true under Ohio law. Ohio's death penalty statutes do not require that any express finding be made regarding an offender's mental retardation. Moreover, at the time Hill was sentenced, an offender's retardation was not a bar to the imposition of the death penalty.

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[1] We note that this court is "not bound by rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court," although such decisions are accorded "some persuasive weight." *State v. Burnett*, 93 Ohio St.3d 419, 424, 2001 Ohio 1581, 755 N.E.2d 857.

[**P43] The Criteria for Imposing Death or Imprisonment for a Capital Offense statute provides that the trier of fact in the penalty phase "shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

[**P44] [*183] [***117] Whether the victim of the offense induced or facilitated it;

[**P45] Whether it is [****17] unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

[**P46] Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

[**P47] The youth of the offender;

[**P48] The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

[**P49] If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

> [**P50] Any other factors that are relevant to the issue of whether the offender should be sentenced to death." R.C. 2929.04(B).

[**P51] Two observations should be made with respect to the statute. The first is that the statute does not require any express finding regarding an offender's mental retardation. In pre-*Atkins* capital cases, an offender's mental retardation was typically considered as a factor, under subsection (7), potentially affecting the [****18] offender's moral culpability for his or her actions. *See, e.g., State v. Bies,* 74 Ohio St.3d 320, 328, 1996 Ohio 276, 658 N.E.2d 754, *State v. Gumm,* 73 Ohio St.3d 413, 432-433, 1995 Ohio 24, 653 N.E.2d 253; *Hill,* 64 Ohio St.3d at 335; *cf. State v. Frazier,* 115 Ohio St.3d 139, 2007 Ohio 5048, at P267, 873 N.E.2d 1263 (an offender's "limited intellectual abilities are entitled to significant weight in mitigation under the catchall provision of R.C. 2929.04(B)(7)"). Thus, the three-judge panel which sentenced Hill to death did not expressly find or even acknowledge Hill's retardation. Rather, the sentencing entry noted that Hill's "low intelligence," "impaired judgment," and "whether or not he was a leader or a follower" were considered as mitigating factors. An express finding that Hill was mentally retarded was not required, nor necessary to sentence him to death under Ohio law at that time.

[**P52] The second observation is that no particular mitigating factor precludes the imposition of the death penalty. The statute is "open-ended," in that the trier of fact must consider any relevant factor. Simply because all relevant factors must be considered does not mean that all relevant factors

are material to the imposition of the death penalty. [****19] The determination that particular mitigating factors exist is only necessary in the sense that these factors must be weighed against the aggravating circumstances, which, in contrast, must be found to exist beyond a reasonable doubt for the death penalty to be imposed.

[**P53] [*184] Beyond consideration of Ohio's death penalty statute, under the federal law in effect at the time of Hill's sentencing, the determination that an offender was mentally retarded was not necessary to the outcome of a capital sentencing hearing. In other words, at the time of his original sentencing, Hill was eligible for the imposition of the death penalty regardless of whether he was found to be mentally retarded. As stated by the United States Supreme Court, "mental retardation is a factor that may well lessen a defendant's culpability for a capital offense," but it could not be said "that the Eighth Amendment precludes the execution of any mentally retarded person *** convicted of a capital offense simply by virtue of his or her mental retardation [***118] alone." *Penry v. Lynaugh* (1989), 492 U.S. 302, 340, 109 S. Ct. 2934, 106 L. Ed. 2d 256.

[**P54] Since mental retardation did not preclude the imposition of the death penalty at the time of Hill's sentencing, the State [****20] did not have "a full and fair opportunity to litigate" the issue during the penalty phase of Hill's trial, as is necessary before collateral estoppel may be applied. *Bies*, 519 F.3d at 338, citing *N.A.A.C.P. Detroit Branch v. Detroit Police Officers Asso.* (C.A.6 1987), 821 F.2d 328, 330; *Goodson*, 2 Ohio St.3d at 201 ("an absolute due process prerequisite to the application of

collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action") (citation omitted).

[**P55] "Collaterally estopping a party from relitigating an issue previously decided against it violates due process where it could not be foreseen that the issue would subsequently be utilized collaterally, and where the party had little knowledge or incentive to litigate fully and vigorously in the first action due to the procedural and/or factual circumstances presented therein." *Goodson*, 2 Ohio St.3d at 201; *State ex el. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St.2d 42, 399 N.E.2d 81, at paragraph two of the syllabus ("[w]here there has been a change in the facts since a decision was rendered in an action, [****21] which either raises a new material issue or which would have been relevant to the resolution of a material issue involved in the earlier action, neither the doctrine of *res judicata* nor the doctrine of collateral estoppel will bar litigation of that issue in a later action").

[**P56] In the present case, the State did not have the knowledge or incentive to vigorously litigate the issue of Hill's mental retardation, since that issue was only tangentially relevant to whether the death penalty was appropriate. There was no reason for the State to contest the evidence of retardation introduced at the mitigation hearing because that evidence did not link Hill's alleged retardation with his culpability for the murder of Raymond Fife. Without this connection, the fact that Hill might be

mentally retarded was not particularly relevant to whether Hill could be executed.

[**P57] [*185] This conclusion is well-supported by the remarks of this court and of the Ohio Supreme Court in the direct appeals of Hill's case. This court observed that Hill's own expert witness, Dr. Darnall, "testified that [Hill] possessed an intellectual understanding of right and wrong and further stated that [Hill's] crimes cannot be attributed [****22] to the fact that he was mentally retarded." 1989 Ohio App. LEXIS 4462, at *89. Thus, "[c]onsideration of evidence delineating appellant's mental retardation is more properly applied when evaluating his ability to knowingly, intelligently and voluntarily waive his constitutional rights." Id. at *90. Likewise, the Ohio Supreme Court dismissed the evidence of Hill's retardation because it found, "[u]pon a careful review of the expert testimony proffered with respect to defendant's mental retardation, *** a very tenuous relationship between the acts he committed and his level of mental retardation. As several of the experts pointed out, defendant did not suffer from any psychosis, and he knew right from wrong." 64 Ohio St.3d at 335.

[**P58] In sum, the United States Supreme Court's decision in *Atkins* changed the law with respect to capital punishment, making an offender's mental retardation a material fact as to whether the death penalty could be imposed. *State v. Lorraine*, [***119] 11th Dist. No. 2003-T-0159, 2005 Ohio 2529, at P27, citing *State v. Bays*, 159 Ohio App.3d 469, 2005 Ohio 47, at P23, 824 N.E.2d 167 ("[t]here is a significant difference between expert testimony offered for mitigation purposes and expert testimony

[****23] offered for *Atkins* purposes"). Previously, an offender's retardation was merely a consideration relative to the degree of moral culpability that may be imputed to an offender for his or her actions. Post-*Atkins*, the fact of an offender's retardation constitutes an absolute bar to the imposition of the death penalty.

[**P59] Additionally, there has been no prior judicial determination that Hill is retarded in accordance with the standards and procedures established by *Lott*. *Hill v. Anderson* (C.A.6 2002), 300 F.3d 679. In a prior habeas petition regarding Hill's *Atkins* claim in the Sixth Circuit, the court ordered the petition to be dismissed and Hill's case remanded for consideration of his *Atkins* claims in state court. The court explained "the state of Ohio has not formally conceded that [Hill] is retarded," although several Ohio courts have reached this conclusion and there is testimony to support it. *Id.* at 682. "Hill's retardation claim has not been exhausted or conceded. Ohio should have the opportunity to develop its own procedures for determining whether a particular claimant is retarded and ineligible for death." *Id.*

[**P60] As noted above, the three-judge panel did not make any express finding [****24] regarding Hill's retardation, but merely noted that his "low intelligence" and "impaired judgment" were considered as mitigating factors. The statements of [*186] subsequent reviewing courts regarding Hill's retardation, were made without reference to any particular standard or definition of retardation. Thus, Hill's case is distinguishable from *Bies*, wherein the Sixth Circuit noted that "the state

supreme court applied the same clinical definition of mental retardation in its determination that [Bies] is mentally retarded as it did in deciding *Lott*." 519 F.3d at 334.

[**P61] For the foregoing reasons, the question of whether Hill is mentally retarded was not necessary nor particularly relevant to Hill's sentencing and, therefore, not "actually and directly litigated." Similarly, under the trial court's analysis, *Atkins* and *Lott* established a new standard for determining what constitutes mental retardation within the context of the Eighth Amendment. Thus, under either analysis, collateral estoppel does not bar the relitigation of this issue. Hill's first assignment of error is without merit.

[**P62] Under the second assignment of error, Hill asserts that the burden of proving that he is not mentally retarded [****25] is on the State. Hill further argues the State must meet its burden by proving that he is not retarded beyond a reasonable doubt and that he is entitled to have this determination made by a jury of his peers.

[**P63] Hill relies upon a line of United States Supreme Court cases beginning with *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435, and which stand for the proposition that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. In *Ring v. Arizona* (2002), 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556, the United States Supreme Court applied its holding in *Apprendi* capital sentencing statutes, such as Ohio's, which

require the finding of certain aggravating factors before the death penalty may be imposed. In *Ring*, the Supreme Court held that the existence of such aggravating factors must be determined [***120] by a jury and proven beyond a reasonable doubt. *Id.* at 602.

[**P64] When the United States Supreme Court ruled that the Eighth Amendment forbade the execution of the mentally retarded, it left to the individual States the task of developing the appropriate procedures for enforcing [****26] the prohibition. *Atkins*, 536 U.S. at 317; *Hill*, 300 F.3d at 682 ("Ohio should have the opportunity to develop its own procedures for determining whether a particular claimant is retarded and ineligible for death").

[**P65] In *Lott*, the Ohio Supreme Court held that "[t]he procedures for postconviction relief outlined in R.C. 2953.21 et seq. provide a suitable statutory framework for reviewing" *Atkins* claims raised by offenders sentenced to death [*187] before *Lott*. 97 Ohio St. 3d 303, 2002 Ohio 6625, at P13, 779 N.E.2d 1011. The Ohio Supreme Court further held that "the trial court," authorized by R.C. 2953.21(A)(1)(a) to determine the merits of postconviction relief petitions, "shall decide whether the petitioner is mentally retarded by using the preponderance-of-the-evidence standard" and that the petitioner bears the burden of establishing that he or she is mentally retarded. *Id.* at P17 and P21. The Ohio Supreme Court expressly stated that "these matters should be decided by the court and do not represent a jury question" and that "placing this burden on a criminal defendant does not violate due process." *Id.* at P18 and P22 (citation omitted). The

court relied upon decisions of the United States Supreme Court holding that sanity and [****27] competence may be presumed and the offender bears the burden of rebutting the presumption. *Id.* at P22, citing *Medina v. California* (1992), 505 U.S. 437, 445-446, 112 S. Ct. 2572, 120 L. Ed. 2d 353.

[**P66] Hill responds that the Ohio Supreme Court's decision in *Lott* does not override "the clear mandate" the United States Supreme Court's decisions in *Apprendi* and *Ring*.

[**P67] Initially, we note that this court is bound to follow the precedent established by *Lott* on the issues of procedure and burden of proof for addressing postconviction claims of mental retardation. *Lorraine*, 2005 Ohio 2529, at P57; *State v. Waddy*, 10th Dist. No. 05AP-866, 2006 Ohio 2828, at P16.

[**P68] Even considering the substance of Hill's assignment of error, we reject the argument that the *Apprendi/Ring* line of cases requires the issue of an offender's mental retardation to be decided by a jury under a reasonable doubt standard. These cases apply to factors ***enhancing*** an offender's punishment beyond what is authorized by statute. "[T]he absence of mental retardation," however, is not "the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt." *In re Johnson* (C.A.5 2003), 334 F.3d 403, 405. The determination that an [****28] offender is not mentally retarded "simply mean[s] that there [i]s nothing to prevent the court from imposing the maximum penalty of death." *State v. Were*, 2005 Ohio 376, at P59. "The issue of retardation can affect a sentence only by mitigating

it. It can never enhance it." *Id.* See also *Walker v. True* (C.A.4 2005), 399 F.3d 315, 326 ("'an *increase*' in a defendant's sentence is not predicated on the outcome of the mental retardation determination; only a decrease") (emphasis sic); *State v. Laney (S.C. 2006)*, 367 S.C. 639, 627 S.E.2d 726, 731 ("[t]he fact a defendant is not mentally retarded is not an aggravating circumstance that increases a defendant's punishment; [***121] rather, the issue is one of eligibility for the sentence imposed by the jury").

[**P69] The second assignment of error is without merit.

[**P70] [*188] Under the third assignment of error, Hill argues the trial court erred in its determination that he is not a person with mental retardation.

[**P71] Ohio's definition of mental retardation for purposes of the Eighth Amendment is based on the clinical definitions of mental retardation promulgated by the American Association on Mental Retardation and the American Psychiatric Association and cited in *Atkins. White,* 118 Ohio St. 3d 12, 2008 Ohio 1623, at P5, 885 N.E.2d 905. [****29] "These definitions require (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." *Lott,* 97 Ohio St. 3d 303, 2002 Ohio 6625, at P12, 779 N.E.2d 1011.

[**P72] The petitioner raising an *Atkins* claim "bears the burden of establishing that he is mentally retarded by a preponderance of the evidence." *Id.* at P21. "In considering an *Atkins* claim, the trial court

shall conduct its own de novo review of the evidence in determining whether the defendant is mentally retarded. The trial court should rely on professional evaluations of [the petitioner's] mental status, and consider expert testimony, appointing experts if necessary, in deciding this matter." *Id.* at P18. Accord, *White,* 118 Ohio St. 3d 12, 2008 Ohio 1623, at PP44-48, 885 N.E.2d 905.

[**P73] "[A] trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *State v. Gondor,* 112 Ohio St.3d 377, 2006 Ohio 6679, at P58, 860 N.E.2d 77.

[**P74] With respect to [****30] the first criterion, significantly subaverage intellectual functioning is clinically defined as an IQ below 70.[2]

[**P75] Hill's IQ was measured nine times between 1973, when he was six years old, and 2000, when he was 33 years old. The scores range from 48 to 71, with the mean being 61.12. In April 2004, Hill scored a 58 on the Weschler Adult Intelligence Scale

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[2] More precisely, significantly subaverage intellectual functioning is defined as two standard deviations below the mean for the general population, i.e. an adjusted score of 100 on a standardized test. A single deviation is considered 15 points. Two deviations means a score of 70 or lower. It should also be noted that an IQ score below 70 is not determinative of a diagnosis of mental retardation. Cf. *Lott,* 97 Ohio St. 3d 303, 2002 Ohio 6625, at P12, 779 N.E.2d 1011 (holding "that there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70").

(WAIS-III). Drs. Hammer, Olley, and Huntsman all agreed that this result was unreliable due to Hill's intentionally trying to obtain a low score.

[**P76] [*189] The trial court found, by a preponderance of the evidence that Hill satisfied the first criterion, a conclusion supported by the opinions of [****31] Drs. Hammer and Olley. Hill does not challenge the court's finding that he demonstrates significantly subaverage intellectual functioning.

[**P77] The second criterion under *Lott* for mental retardation requires the offender to demonstrate significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction.[3] [***122] Like intellectual functioning, a person's adaptive skills is subject to standardized measurement, properly known as psychometric analysis.

[**P78] In the present case, Drs. Hammer, Olley, and Huntsman attempted to administer [****32] various adaptive behavior tests, including the Street Survival Skills Questionnaire (SSSQ), the Woodcock Johnson Tests of Achievement, and the Adaptive Behavior Assessment System (ABAS-II). No reliable

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[3]The American Psychiatric Association's definition of mental retardation identified the following categories of adaptive skills: communication; self-care; home living; social/interpersonal skills; use of community resources; self-direction; functional academic skills; work; leisure; health; and safety. In 2002, the American Association on Mental Retardation distilled these categories into three broad groups of adaptive skills: conceptual adaptive skills; social adaptive skills; and practical adaptive skills. The Association on Mental Retardation's definition only requires that a significant deficit in one of these groups be demonstrated.

results could be obtained, again on account of Hill's lack of effort. In several instances, Hill denied being able to perform certain skills which it could be determined from independent observation or collateral information sources that he was able to perform.

[**P79] On four occasions, between 1980 and 1984, the Vineland Social Maturity Scale (Vineland I), a measure of adaptive behavior, was administered to Hill. Vineland I yields two types of scores. The first is a "social age" or "age-equivalent" score. The second is a "social quotient" or SQ, similar to an IQ in that the score is scaled according to an average score of 100 for the general population. An SQ score of 70, representing two standard deviations below the mean, is necessary for a diagnosis of mental retardation. Only three social age scores are recorded from the results of the Vineland I tests. When Hill was 13 years old, it was reported that his social age was 14. When Hill was 15 and 17 years old, his reported social age was [****33] 12. In only one instance was an SQ score calculated. When Hill was 17, Dr. Darnall determined his SQ to be 82.9, which would place Hill in the "borderline" category of mental development, but would not support a diagnosis of mental retardation. Dr. Darnall testified at the mitigation hearing that there was room for "potential bias" in the results of the Vineland I SQ score, however, because the source of the information was Hill's mother and she might have overstated Hill's abilities.

[**P80] [*190] At the evidentiary hearing, Dr. Olley calculated approximate SQ scores for Hill based on the reported social age scores and obtained

results that placed Hill in the borderline range of social/adaptive development.

[**P81] In rebuttal, Hill presented the testimony of Dr. Sparrow, who helped to revise the Vineland I test in 1984, renaming it the Vineland Adaptive Behavior Scales (Vineland II). Dr. Sparrow testified that, at the time the Vineland II test was being developed, a "linkage study" was conducted by administering both Vineland tests to a sample population of 389 persons to determine what correlation existed between the tests. Based on the study's results, Dr. Sparrow developed a method of predicting what [****34] Vineland II scores would be obtained based on Vineland I scores. In this way, she was able to recalculate Hill's Vineland I scores to reflect what he would have obtained under the Vineland II test. Hill's recalculated Vineland scores placed him in the mentally retarded range of scores with respect to adaptive functioning.

[**P82] In response to Dr. Sparrow's testimony, the State presented Dr. Hancock as a surrebuttal witness. Dr. Hancock [***123] opined that, based on the degree of correlation between the two Vineland tests testified to by Dr. Sparrow, her recalculation of Hill's adaptive skills was only 27% percent reliable.[4] Thus, Dr. Hancock concluded that Hill's recalculated Vineland scores were not scientifically reliable. Based on Dr. Hancock's testimony, the State objected to the admission of Dr. Sparrow's testimony.

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[4] Specifically, Dr. Sparrow testified the correlation coefficient between Vineland I and II used in the linkage study was .55. According to Dr. Hancock, a minimum coefficient of .866 was necessary to provide 50% certainty that the correct score on Vineland II would be predicted from Vineland I scores.

[**P83] The Ohio Rules of Evidence provide that a witness may testify as an expert where "[t]he [****35] witness' testimony is based on reliable scientific, technical, or other specialized information" and "[t]he particular procedure, test, or experiment was conducted in a way that will yield an accurate result." Evid.R. 702(C)(3). "In evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance." *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 1998 Ohio 178, at 611, 687 N.E.2d 735, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 593-594, 113 S. Ct. 2786, 125 L. Ed. 2d 469. The "inquiry focuses on whether the principles and methods *** employed to reach [the] opinion are reliable, not whether [the] conclusions are correct." *Id.*

[**P84] [*191] "Decisions regarding the admissibility of evidence are within the broad discretion of the trial court." *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005 Ohio 4787, at P20, 834 N.E.2d 323 (citation omitted); *Kumho Tire Co. v. Carmichael* (1999), 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 ("a court of appeals is to apply an abuse-of-discretion standard when it 'reviews a trial court's [****36] decision to admit or exclude expert testimony'") (citation omitted). "Even in the event of an abuse of discretion, a judgment will not be disturbed unless the abuse affected the substantial rights of the adverse party or is inconsistent with substantial justice." *Beard*, at P20 (citation omitted).

[**P85] In the present case, the trial court "concluded that the rate of error of Dr. Sparrow's conclusions on the limited issue of re-casting [Hill's] old scores in a fresh light is so high as to render her testimony inadmissible under the Daubert principle." The trial court explained that it was rejecting Dr. Sparrow's testimony not because she lacked the proper qualifications or because her opinions lacked general acceptance, but because Dr. Hancock testified the accuracy of her linkage study between the tests fell below 50% mathematical probability and this was not disputed. The trial court's conclusion regarding Dr. Sparrow's testimony does not constitute an abuse of discretion.

[**P86] Alternatively, the trial court stated that it would reject Dr. Sparrow's testimony in favor of the more credible testimony of the other experts who concluded that Hill's adaptive capabilities are greater than those of [****37] a person with mental retardation. The trial court noted Drs. Hammer, Olley, and Huntsman all testified that the Vineland tests were not the most accurate measurement of adaptive behavior available and that other tests are preferable, such as the Scales of Independent Behavior, Revised (SIB-R). *Cf. White*, [***124] 118 Ohio St. 3d 12, 2008 Ohio 1623, at PP49-51, 885 N.E.2d 905.

[**P87] Apart from the problematic standardized measurements of Hill's adaptive skills, the trial court and the expert witnesses had to rely on collateral, largely anecdotal evidence to determine the level of Hill's adaptive functioning. The trial court acknowledged that such evidence constituted a "thin reed" on which to make conclusions about Hill's

diagnosis, but also recognized that this situation was the result of Hill's failure to cooperate with the experts retained to evaluate him.[5] This court further emphasizes that the burden was on Hill to demonstrate that he is mentally retarded, not on the State to prove that he is not mentally retarded.

[**P88] [****38] The anecdotal evidence before the trial court consisted of the following:

[**P89] [*192] *Public School Records.* Hill's public school records amply demonstrate a history of academic underachievement and behavioral problems. Hill is often described as a lazy, manipulative, and sometimes violent youth. Although there are references to Hill being easily led or influenced by others, the trial court noted that much of Hill's serious misconduct, including two Rapes committed prior to Fife's murder, occurred when he was acting alone. Hill knew how to write and was described by at least one of his special education teachers as "a bright, perceptive boy with high reasoning ability."

[**P90] *Hill's Trial for the Murder of Raymond Fife.* The trial court observed that the record of Hill's murder trial provided evidence of Hill's ability concerning self-direction and self-preservation. In particular, the court noted Hill's initiative in coming to the police in order to misdirect the focus of the investigation by implicating others and Hill's ability to adapt his alibi to changing circumstances in the

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[5] Hill's own expert, Dr. Hammer, testified that the results of Hill's performance on the Test of Memory Malingering (TOMM) "casts doubt on all the testing information collected from Mr. Hill during the evaluation process."

course of police interrogation. This last point was also noted by Dr. Olley in his hearing testimony: Hill "stood his ground [****39] during that interrogation very, very strongly. *** He not only modified his story a little bit when he was faced with evidence that couldn't possibly have avoided. *** That to me is a kind of thinking and planning and integrating complex information that is a higher level than I have seen people with mental retardation able to do."

[**P91] *Death Row Records.* At the time of the evidentiary hearing, Hill had been incarcerated on death row for twenty years. From this period of time, the trial court considered audio-taped interviews of Hill by Warren's Tribune Chronicle reporter Andrew Gray in the year 2000. These interviews were arranged on Hill's initiative in order to generate publicity for his case. The trial court found Hill's performance on these tapes demonstrated a high level of functional ability with respect to Hill's use of language and vocabulary, understanding of legal processes, ability to read and write, and ability to reason independently.

[**P92] The trial court considered the evidence of the various prison officials who testified at the evidentiary hearing. These witnesses consistently testified that Hill was an "average" prisoner with respect to his abilities in comparison with other [****40] death row inmates. They testified that Hill interacted with the other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules. Prison officials offered further testimony in their [***125] interviews with the expert psychologists. One official opined that Hill began to behave

differently after the *Atkins* case was decided and he believed that Hill was "playing a game" to make others think he is retarded. Another official reported that Hill's self-care was "poor but not terrible" and that Hill had to be reminded sometimes about his hygiene.

[**P93] [*193] *Hill's Appearances in Court.* The trial court stated that it had "many opportunities" to observe Hill over an extended period of time and, as a lay observer, did not perceive anything about Hill's conduct or demeanor suggesting that he suffers from mental retardation.

[**P94] Finally, the trial court relied on the expert opinions of Drs. Olley and Huntsman that, with reasonable psychological certainty, Hill's adaptive skill deficiencies do not meet the second criterion for mental retardation set forth in *Lott.* Both doctors relied, in part, on the same anecdotal evidence considered by the trial court. [****41] The doctors also conducted interviews with Hill and particularly noted Hill's memory of events surrounding Fife's murder twenty years before and his ability to recount the narrative of the events and the complex legal history of his case since that time.

[**P95] It is important to note that the trial court's use of anecdotal evidence in the present case is distinguishable from the use of such evidence in *White,* 118 Ohio St. 3d 12, 2008 Ohio 1623, 885 N.E.2d 905. In *White,* the Ohio Supreme Court reversed a trial court's finding that an *Atkins* petitioner is not mentally retarded where the trial court had relied on anecdotal evidence, such as the fact that the petitioner had a driver's license and could play video games, to support its finding that

the petitioner did not demonstrate significant deficits in adaptive skills.

[**P96] In the present case and in *White* the trial court relied upon its own perceptions and other lay testimony that the petitioner appeared to function normally. The Supreme Court held this reliance constituted an of abuse discretion in light of expert testimony that "retarded individuals *'may look relatively normal in some areas* and have *** significant limitations in other areas.'" *Id.* at P69 (emphasis sic).

[**P97] The [****42] difference between the two cases lies in the fact that, in the present case, two of the expert psychologists considered the same anecdotal evidence as the trial court and concluded that Hill was not mentally retarded. The trial court's conclusions were consistent with and supported by the expert opinion testimony. In *White,* the two psychologists who examined the petitioner concluded that there were significant deficiencies in two or more areas of adaptive functioning. *Id.* at P21. Thus, the trial court in *White* had substituted its judgment for that of the qualified experts. "While the trial court is the trier of fact, it may not disregard credible and uncontradicted expert testimony in favor of either the perceptions of la[y] witnesses or of the court's own expectations of how a mentally retarded person would behave. Doing so takes an arbitrary, unreasonable attitude to the evidence before the court and results in an abuse of discretion." *Id.* at P74.

[**P98] [*194] Another difference is that in *White* the experts were able to administer the SIB-R to the petitioner and obtain a psychometrically reliable

measurement of his adaptive functioning. *Id.* at PP14-20. In the present case, the only qualitative [****43] measurement of Hill's adaptive functioning, the Vineland I test administered when Hill was 17, indicated that Hill functioned at a level above that of the mentally retarded. Apart from this test, the trial [***126] court in the present case had no choice but to rely on anecdotal evidence and/or Drs. Olley and Sparrow's doubtful extrapolations of Hill's adaptive ability.

[**P99] In light of the foregoing, there is abundant competent and credible evidence to support the trial court's conclusion that Hill does not meet the second criterion for mental retardation.

[**P100] With respect to the third criterion, the trial court found that Hill had failed to demonstrate the onset of mental retardation before the age of 18. The trial court's conclusion mirrors its findings under the first two criteria: Hill demonstrated, by a preponderance of the evidence, significantly subaverage intellectual functioning prior to the age of 18, but failed to demonstrate significant limitations in two or more adaptive skills. The evidence supporting the trial court's conclusions is discussed above.

[**P101] The third assignment of error is without merit.

[**P102] In the fourth and final assignment of error, Hill argues that he was not properly evaluated [****44] to determine his competency to proceed with this appeal. Hill asserts that Dr. Gazley did not perform any psychological testing in his evaluation and that the trial court failed to provide Hill with the

resources to conduct an independent competency evaluation.

[**P103] "There is no requirement that [an offender] be competent in order for his appeal to proceed *** in the court of appeals." *State v. Brooks*, 92 Ohio St.3d 537, 539, 751 N.E.2d 1040.

[**P104] After the filing of Hill's appeal, however, this court remanded this case with orders for the trial court to determine his competency "to make decisions regarding his counsel and possible waiver of the right to appeal." *Cf. State v. Jordan*, 101 Ohio St.3d 216, 2004 Ohio 783, at P27, 804 N.E.2d 1 (discussing the standard of competence necessary to waive counsel); *State v. Berry*, 80 Ohio St.3d 371, 375-376, 1997 Ohio 336, 686 N.E.2d 1097 (discussing the standard of competence necessary to waive collateral proceedings in a capital case).

[**P105] The trial court appointed Dr. Gazley through the Forensic Psychiatric Center of Northeast Ohio, who interviewed Hill on two occasions. Dr. Gazley also reviewed a court-ordered psychological evaluation of Hill performed by Dr. Huntsman from June 2004. [****45] Dr. Gazley concluded, with reasonable psychological certainty, that Hill's "current statements regarding the appeal process, as well as [*195] his legal representation, are indicative of adequate mental capacity and a knowing, intelligent, and voluntary reasoning ability, having chosen means which relate logically to his stated end." The trial court conducted a competency hearing at which Dr. Gazley testified and found Hill competent to proceed with his appeal.

[**P106] Hill cites no authority for the proposition that Dr. Gazley's evaluation of his

competency was inadequate or that he is entitled to an independent evaluation. On the contrary, it has been held that "[a] defendant in a criminal case has no absolute right to an independent psychiatric evaluation" to determine competency. *State v. Marshall* (1984), 15 Ohio App.3d 105, 15 Ohio B. 195, 472 N.E.2d 1139, at paragraph two of the syllabus; accord *State v. Perry* (June 14, 2001), 5th Dist. No. 00-CA-83, 2001 Ohio App. LEXIS 2820, at *10. Moreover, "a psychiatrist's written report and corroborative testimony that the defendant was competent to stand trial is sufficient evidence to support the trial court's finding of competency." *State v. Neeley*, 12 [***127] Dist. No. CA2002-02-002, 2002 Ohio 7146, at P13.

[**P107] [****46] The fourth assignment of error is without merit.

[**P108] For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas, denying Hill's petition for postconviction relief on the grounds that he is a person with mental retardation, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

Dissent by: COLLEEN MARY O'TOOLE

DISSENT

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

[**P109] I respectfully dissent.

[**P110] With respect to appellant's third assignment of error, the majority contends the trial court did not err by finding that appellant was not a person with mental retardation. I disagree.

[**P111] In *Atkins*, supra, at 308, fn.3, the United States Supreme Court quoted the definitions of mental retardation promulgated by the AAMR and the APA.

[**P112] The AAMR defines mental retardation as "'substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, [*196] social skills, community use, self-direction, health and safety, [****47] functional academics, leisure, and work. Mental retardation manifests before age 18.'" *Id.*, quoting Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th Ed. 1992).

[**P113] The APA's definition is similar: "'The essential feature of Mental Retardation is significantly subaverage general intellectual functioning *** that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety ***. The onset must occur before age 18 years ***. 'Mild' mental retardation is typically used to describe people with an IQ level of 50 to 55 to approximately 70.'" *Id.*

[**P114] In *Lott*, supra, at P12, the Supreme Court of Ohio held: "Clinical definitions of mental retardation, cited with approval in *Atkins*, provide a standard for evaluating an individual's claim of mental retardation. *** [Again,] [t]hese definitions require (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18."

[**P115] The following chart represents a summary of appellant's [****48] IQ scores and psychological evaluations up to April 2004 all of which fall in the mildly mentally retarded range:

[**P116] [***128]

CHRONOLOGICAL AGE	FULL SCALE IQ
6 years and 2 months	70
8 years and 8 months	62
13 years and 4 months	48
13 years and 5 months	49
15 years and 3 months	63
17 years	55
18 years	68
18 years	64
33 years	71

[**P117] Appellant's date of birth is January 6, 1967. Appellant entered kindergarten in the Warren City Schools, and was referred by his teacher as she had questions and concerns "regarding his present level of intellectual functioning." As a result of his first evaluation on March 20, 1973, appellant was placed in special education, specifically an educably mentally retarded ("EMR") class, due to his score on

the Stanford-Binet test. Appellant, at age 6, did not know his age and thought he was 9. He was immature, did not know his address and possessed functioning in the visual motor category at the 3 year six month level. His reading and verbal skills were at the 5 year old level and he [*197] had a mental age of 4 years 6 months. He was placed on medication as he was also hyperactive. His intellectual functioning was in the third percentile as compared to the general population. Appellant was tested again [****49] on September 10, 1975. He was chronologically 8 years and 8 months. He tested at an overall 62 which at the time was categorized as educably mentally retarded. Appellant earned a mental age on the Stanford-Binet test of 5 years and 6 months. He was placed in the first stanine group or in the first percentile in comparison to the general population. He was deficient in reading at a 1.2 grade level and his spelling was at a .6 grade level equivalent. He indicated weakness in verbal reasoning and abstract thinking. He could not spell his last name correctly. It is noted in the evaluation that appellant "will be limited to his ability to generalize, to transfer learning from one situation to another, to do abstract reasoning or to do much self evaluation."

[**P118] Dr. Hammer testified that appellant tested in the mild mentally retarded range. Appellant's score of 48 on the Wechsler Intelligence Scale for Children at age 13 years and 4 months taken in May of 1980, established him in the moderately mentally retarded range. His "relative weaknesses lie in not being able to recall everyday information, do abstract thinking, perform mental arithmetic, perceive a total social situation, perceive

patterns [****50] and to reproduce symbols using psychomotor speed and coordination." He frequently engaged in behaviors such as making noises and faces when talking, rolling eyes to the back of his head, being restless and tired, working with pencil hanging out of mouth. He exhibits weaknesses in reasoning ability, originality, verbal interaction, and lack of intellectual independence.

[**P119] Appellant was tested again at his school on August 22, 1982. At 15 years old, his reading and math were at a third grade level. The next psychological evaluation was performed by the juvenile court's psychologist at the request of Judge Norton for a bind over proceeding on or about January 10, 1984. Appellant was accused and later pleaded to two rapes. In two years time, he had amassed 13 juvenile felony charges. At age 17 and in ninth grade with a score of [***129] 55, Douglas Darnell ("Dr. Darnell"), a psychologist for the Trumbull County Court of Common Pleas, opined that appellant was mildly mentally retarded, and possessed "significant deficient in his verbal functioning, possessed poor judgment, does not think of consequences, is highly suggestible." He also opined that appellant requires long term structured rehabilitation, [****51] "Because of his passivity and limited intellectual ability he can easily be swayed." He also stated that "Danny does not comprehend the seriousness of his offenses." Dr Darnell further opined in his report that "his level of adaptive functioning is poor. And he needs a highly structured facility that can provide programming for mentally retarded youth." Further, he stated that unfortunately the record shows that [*198] his family cannot provide such an environment. The probation

department agreed and requested, due to his mental retardation and the risk of exploitation if placed in an adult facility, that the request for the bind over should be denied and that he should be placed in a group home and that "Danny will in time need to live in an adult halfway house which would be able to provide both social as well as vocational habilitation." The bindover was denied and appellant was sentenced to TCY. On April 25, 1984, Chief Psychologist at TCY, R.W.Jackson, opined in regard to retesting appellant as part of the intake procedure that he tested at a 65 IQ, and described appellant as, "intellectually limited, socially constricted youth with very few interpersonal coping skills, rather immature [****52] and self centered with needs of attention and approval of others." He also stated that "it appears that Danny will adjust himself to a well structured program. He is so easily led and willing to do what he is instructed to do." Furthermore, "In a structured program Danny could no doubt function quite well." Appellant's sentence was concluded after his eighteenth birthday. He was discharged in 1985, and was returned home to his mother, who is also mentally retarded, and reenrolled in school.

[**P120] Shortly after his arrest, on the charges for which he has been convicted and sentenced to death, appellant, at the age of 18, scored a 68 on the Wechsler Adult Intelligence Scale Revised test. As part of the mitigation preparation, appellant was administered another test in which he scored a 64. At age 33, appellant submitted to an IQ test in prison where he scored a 71.

[**P121] In the instant case, pursuant to the foregoing, appellant was found to be mentally

retarded. The record establishes that appellant met the first prong of *Atkins/Lott* as evidenced by IQ scores below 70. The trial court properly found that appellant satisfied that prong.

[**P122] With regard to adaptive skills, the Supreme Court of Ohio in [****53] *White*, supra, at P13, recently stated:

> [**P123] "'(C)linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills (***) that became manifest before age 18.' *Atkins*, 536 U.S. at 318 ***. Adaptive skills are those skills that one applies to the everyday demands of independent living, such as taking care of oneself and interacting with others. Adaptive behavior tests are designed to assess how a person applies those skills in the tasks of everyday life." (Parallel citations omitted.)

[**P124] The Supreme Court in *White* went on to state:

> [**P125] "The mentally retarded are not necessarily devoid of all adaptive skills. Indeed, 'they may look relatively normal in some areas and have certain significant limitations in other areas.' Mildly retarded persons can play sports, [*199] write, hold [***130] jobs, and drive. *** [I]n determining whether a person is mentally retarded, one must focus on those adaptive skills the person lacks, not on those he possesses." *Id.* at P65.

[**P126] Drs. Hammer, Olley, and Huntsman all agreed on a protocol for testing appellant in April

2004, and administered various tests, including the Wechsler Adult Intelligence Scale-III, [****54] the Test of Memory Malingering, Street Survival Skills Questionnaire, Woodcock-Johnson Tests of Achievement, and the Adaptive Behavior Assessment System-II. All three experts agreed, after testing appellant, that the results were unreliable. Thus, it became necessary to look at other sources, including historical data, to make a determination regarding appellant's mental retardation. The historical data indicated substantial deficits in adaptive skills.

[**P127] The trial court, however, found that appellant is not mentally retarded based upon his superior adaptive behavior. The trial court stressed appellant's fluency with the language and his articulate presentations in interviews. However, throughout his life, various examiners, including Risinger, have found that appellant had poor hygiene, was easily led, and was unable to provide his address and phone number. All of the examiners who tested appellant before age 33, in preparation for the hearing, found him lacking in multiple adaptive areas. Dr. Sparrow testified that although appellant may have a good vocabulary, adaptive behavior communications does not measure level of vocabulary in any way. Anyone who talks to him is "left in the [****55] dust" trying to figure out what he is talking about. This shows a deficit in the adaptive behavior of language.

[**P128] The trial court compared appellant to other death row inmates. However, pursuant to the AAMR, the diagnosis of mental retardation is relative to the general population. Although

appellant may be manipulative and a malingerer, he can still be and is mentally retarded.

[**P129] Appellant introduced the rebuttal testimony of Dr. Sparrow, one of the three authors of the Vineland Adaptive Behavior Scale, which was a revision of the Vineland Social Maturity Scale, and administered to appellant four times. Although her credentials are very impressive, the trial court determined that Dr. Sparrow's rate of error in recasting the old Vineland scores was so high as to render her testimony inadmissible under *Daubert*, or alternatively, her testimony was rejected outright in favor of Dr. Hancock's opinion.

[**P130] In *Daubert*, paragraph c of the syllabus provides in part that the trial court: "*** must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. Many considerations will bear on the [****56] inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer [*200] review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. ***"

[**P131] Here, Dr. Sparrow testified about a linkage between the two tests. She indicated that within the control group of people taking both the old and new Vineland, she used a straight correlation between the scores. Dr. Sparrow stated that when

two tests target the same areas, [***131] one can use this method to link and make a comparison of the scores. The technique at issue has been tested. The linkage data is included in the testing manual, so the methodology has gained general acceptance. Dr. Sparrow's testimony should not have been excluded. However, the error is harmless. Even without her testimony, the historical evidence is overwhelming in regard to adaptive deficits and mental retardation as observed and [****57] documented by both the juvenile court and the multiple evaluators at the Warren City Schools and Brickhaven residential placement and the juvenile department of corrections TCY.

[**P132] The prior testing and independent observations demonstrate by a preponderance of the evidence that appellant's scores prior to the age of 18 satisfy the criteria for deficits in adaptive behavior with respect to the second standard under *Lott*.

[**P133] With regard to the onset before age 18, the trial court found that, although appellant had an IQ in the mildly mentally retarded range, there was no evidence to show that he met the criteria of deficits in adaptive functioning. This dehors the record. The trial court concluded this, despite overwhelming evidence and evaluations to the contrary from a multitude of sources that he spent virtually all of his school years in programs for the mentally retarded. Appellant's IQ scores ranged from 48 to 70, during the time period when he was first tested at 6 years and 2 months, up to the age of 18. The record establishes that appellant had poor personal hygiene, was immature, behaved inappropriately, had difficulty making friends,

lagged behind intellectually, and was consistently [****58] developmentally slow. Appellant committed serious crimes at the age of 17. However, the fact that he engaged in criminal conduct does not negate a diagnosis of mental retardation. The record supports the fact that appellant experienced the onset of mental retardation prior to the age of 18, thereby satisfying the third standard under *Lott*.

[**P134] Based on *Atkins*, executing a person with mental retardation status, regardless of context, violates the Eighth Amendment. Here, I believe the trial court abused its discretion in finding that appellant was not a person with mental [*201] retardation, since he met the three *Lott* criteria for classification as mentally retarded.

[**P135] Accordingly, I would affirm in part, reverse in part, and remand the matter for resentencing under the statutory guidelines for non-capital cases of aggravated murder.

APPENDIX H

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

Case No. 85-CR-317
Death Penalty Case

STATE OF OHIO,

Respondent

-vs-

DANNY LEE HILL,

Petitioner

Judge Thomas P. Curran

Filed: Feb. 15, 2006

JUDGMENT ENTRY
(Findings of Fact and Conclusions of Law)

I. INTRODUCTION[1]

Danny Lee Hill has filed this successor petition for post conviction relief (PCR), contending that he is entitled to relief from the penalty of death on the ground that he is mentally retarded. For the reasons that follow, this court denies the petition.

On June 20, 2002, the Supreme Court of the United States ruled that execution of mentally retarded criminals violates the Eighth Amendment's proscription against cruel and unusual punishment. *Atkins v. Virginia,* 536 U.S. 304. In establishing a

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[1] An Index to this Opinion is on the last page.

new constitutional rule, the Supreme Court held that evolving standards of decency in America: now reflect a consensus that death is not a suitable punishment for a mentally retarded criminal. The *Atkins* case directly overruled the Supreme Court's decision thirteen years earlier in *Penry v. Lynaugh,*(1989) 492 U.S. 392. The *Atkins* holding applies retroactively.[2]

Petitioner Hill was convicted of the 1985 capital murder of 12-year-old Raymond Fife of Warren, Ohio. In this current collateral attack on the capital penalty aspect of his capital conviction, Danny Lee Hill seeks a declaration that he is insulated from the death penalty by virtue of mental retardation. Articulating a new constitutional imperative, the United States Supreme Court left to the States the task of fashioning procedural rules and guidelines for the enforcement of the constitutional restriction.[3] In

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[2] Although the Court in *Atkins* made no express pronouncement of retroactive application, several federal circuit courts have stated expressly that *Atkins* applies retroactively. In fact, the Sixth Circuit, discussing various precedents, has concluded that the *Atkins* rule applies retroactively. See *Hill v. Anderson,* 300 F.3d at 681, in which the Sixth Circuit, addressing Danny Lee Hill's federal habeas corpus action, remanded Hill's case to this court. The Sixth Circuit has noted that retroactivity applies to a rule that eliminates the State's power to execute the mentally retarded. Unlike strictly procedural rules, new rules of substantive criminal law are presumptively retroactive. Under the particular circumstances, the retroactivity *is* said to apply to cases under collateral review by virtue of the habeas corpus statute, 28 U.S.C. Section 2254. *See In re Holliday,* (2003 11th Cir.) 331 F.3d 1169.

[3] In the *Atkins case,* the issue of mental retardation was remanded to the Virginia state court to determine whether one Daryl Renard Atkins was so impaired as to fall within the range of mentally retarded offenders about whom there *is* a

response to the U.S. Supreme Court's directive, the Ohio Supreme Court laid down a set of procedural guidelines and substantive standards for the resolution of mental retardation claims. *State v. Lott*, (2002) 97 Ohio St.3d 303. 2002-Ohio-6625.

II. GUIDELINES OF THE OHIO SUPREME COURT FOR THE CONDUCT OF AN *ATKINS* HEARING

In the case *sub Judice*, this court has conducted an *Atkins* hearing under guidelines and standards established by the Ohio Supreme Court in *State v. Lott*. The salient features of an *Atkins* hearing in Ohio, in regard to death row prisoners (that is to say, defendants whose cases have **already been tried before** *Atkins* was decided) are as follows:

- Clinical definitions of mental retardation, as defined by the American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA) provide the standard for evaluating an individual's claim of mental retardation. The term mental

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national consensus disfavoring the death penalty. In ordering a remand, the High Court observed that not all who claim to be mentally retarded would fall into the protected class of offenders. Unlike the State of Ohio, the Commonwealth of Virginia provides for jury trial on the issue of mental retardation. Atkins, himself, was unable to prevail on his claim of mental retardation, the jury's verdict of August 5, 2005 reciting that "WE, THE JURY, unanimously find that the Defendant has not proven by a preponderance of the evidence that he is Mentally Retarded."

retardation, then, has a forensic definition, with scientific components.[4]

- Procedures for post conviction relief set forth in the Ohio Revised Code (Section 2953.21, et seq.) provide the statutory framework for the conduct of such hearings for defendants already facing the penalty of death.
- "[A) trial court's ruling on mental retardation should be conducted in a manner comparable to a ruling on competency . . . ."[5]
- Because *Atkins* recognizes a new constitutional right, the statutory procedures applicable to a second or successor petition (such as herein present) are suspended in favor of 'first petition' consideration, provided

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[4] Both the AAMR and the APA definitions of mental retardation are merely referenced in a footnote in the *Atkins* decision, whereas the Ohio Supreme Court in *Lott* explicitly embraces these definitions as the legal standard. *Atkins* at footnote 3. *Lott* at 305.

[5] The analogy to competency issues implicitly invokes Chapter 2945 of the Revised Code for both classes of defendants—those already convicted and those yet to be tried. *Lott* refers to R.C. 2945.37(G) at para. 21 of the opinion. *See also* para. 25. For new cases, the hearing would be staged before the trial, raising numerous questions, notably: how one deals (if at all) with the underlying facts of the alleged crime. One solution might be to evaluate the facts anecdotally, in that the psychologist would evaluate incident reports—perhaps those about which there was no disagreement. *But see State v. Were*, 2005 Ohio 376, 2005 WL 267671 (lst Dist. Hamilton Cty.), in which the trial judge staged the Atkins hearing between the guilt phase and the penalty phase of the trial. Considering the time involved in developing school records, testing results, and the like, not to mention the matter of expert reports and expert witnesses, this was a remarkable achievement.

the PCR petition is filed within 180 days of December 11, 2002, the date of the *Lott* decision.[6]

- The burden of proof is upon the petitioner to establish mental retardation by a preponderance of the evidence.
- The trial judge, not a jury, shall decide whether the petitioner is mentally retarded. (This is by analogy to competency-to-stand-trial issues, where, in Ohio, the judge, not the jury, renders the decision.)
- The trial court shall adhere to the following procedures: hold a hearing, receive testimony and conduct its own de novo review of the evidence in determining the ultimate issue; rely on professional evaluations of the petitioner's mental status; appoint experts, if necessary; "make written findings and set forth its rationale for finding the defendant mentally retarded or not mentally retarded." *Lott*, supra, 97 Ohio St.3d at 306.

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[6] This is a critical distinction. O.R.C. Section 2953.23 (A)(l)(b)(2) relating to second or successor petitions and retroactive application of newly recognized federal constitutional rights, establishes a "clear and convincing" threshold to trigger post conviction relief, whereas first petition consideration invokes a preponderance-of-the-evidence test. This divergence from the statutory mandate is the subject of Justice Cook's partial dissent in *Lott*, supra, 97 Ohio St.3d at 308.

III. MENTAL RETARDATION—THE FORENSIC DEFINITION

The definitions of mental retardation are gleaned from the American Association of Mental Retardation (AAMR.) and the American Psychiatric Association (APA). These associations define mental retardation as follows:

1. Significantly subaverage intellectual functioning;

2. Significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction; and

3. Onset before the age of 18.

As noted by the United States Supreme Court:

> The American Association of Mental Retardation (AAMR) defines mental retardation as follows: Mental retardation refers to substantial limitations in **present functioning.** It is characterized by significantly sub-average intellectual functioning, **existing concurrently** with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18. [Citing] Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).

The American Psychiatric Association's definition is similar: The essential feature of

> Mental Retardation is significantly sub-average general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). **The onset must occur before age 18 years** (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system. [Citing] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. Id. at 42-43.
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> The above cited in *Atkins v. Virginia*, 536 U.S. 304, footnote 3. (Emphasis in bold added.)

IV. PROCEDURAL HISTORY, MOTION PRACTICE AND MISCELLANEOUS EVENTS

Considerable motion practice has preceded the actual hearing on the merits of this Atkins claim. Much of the pre-hearing motion practice has been addressed in this court's Judgment Entry of March 19, 2004, and a second Judgment Entry of November 8, 2004. It will be helpful to revisit some of these procedural rulings together with a number of miscellaneous events, because of their potential relevance to Petitioner's adaptive skills.

A. Procedural History of Recent Collateral Litigation

When *Atkins* was decided, Danny Lee Hill was in the midst of pursuing federal habeas corpus as a State prisoner. 28 U.S.C. Section 2254. The United States District Court (N.D. Ohio) denied the petition, from which a direct appeal was prosecuted to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit remanded the case to the federal district court, instructing the district court to dismiss the *Atkins* claim in favor of exhausting state remedies. Establishing a timeline for a state filing, the court of appeals made reference to a "mixed petition problem," concluding that the petitioner's 'mixed claims' warranted a stay of the federal petition, pending the exhaustion of state action of the *Atkins* claim.[7] In November of 2002, and pursuant to the order of the Sixth Circuit, Hill's attorneys timely filed various papers and petitions in the Court of Common Pleas of Trumbull County.[8] Because the

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[7] The mixed petition problem relates to a collateral attack involving an issue raised for the first time in the federal proceeding (in this instance the unexhausted *Atkins* claim) mixed with a claim previously exhausted in state court. The exhausted claim in this case relates to the claim of a coerced confession. That issue remains in federal court suspense, pending the petitioner's exhaustion of his Atkins claim in state court. The federal court of appeals had the statutory option of dismissing the writ of habeas corpus entirely, but refused to do so, stating "Hill's confession raises a serious question." 300 F.3d at 682. The confession issue is not before this Court of Common Pleas.

[8] Within the time allotted by the 6th Circuit, the petitioner filed papers on November 6, 2002: "Petitioner Hill's Notice of Intent to Comply With Federal Court Holding .. [etc.] .... ;" and "Petitioner Hill's Motion for Appointment of Counsel .. [etc.] ....

United States Supreme Court left it to the States to develop procedures for the resolution of this capital jurisprudence issue, the parties awaited the decision in *State v. Lott*, 97 Ohio St.3d 303. *Lott* was decided December 11, 2002. On January 17, 2003, Hill's attorneys filed an amended petition invoking both the *Atkins* and *Lott* cases, as well as Ohio Revised Code§ 2953.21.[9]

From time to time during the first half of 2003, the Court of Common Pleas, (the Honorable Andrew D. Logan, Administrative Judge), conducted various scheduling conferences and issued a number of procedural rulings, withholding decisions on certain issues.

In the meantime, in response to a motion for recusal, Judge Logan entered an order on June 19, 2003, announcing that all of the Judges of the Trumbull County Court of Common Pleas were recusing themselves in order to avoid even the appearance of impropriety that might arise from any

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"On November 27, 2002, the Ohio Public Defender filed "Petition to Vacate Danny Hill's Death Sentence Pursuant to *Atkins v. Virginia*."

[9] The Public Defender has expressed some doubt as to which post conviction relief statute should apply: R. C. §2953.21 or .23. For purposes of applying the burden of proof rule, the answer is clear that "preponderance of the evidence" is the applicable test, as opposed to the "clear and convincing evidence" test enunciated in §2953.23, relating to successive petitions generally. The logic is that *Atkins* recognizes a new constitutional protection; and, in any event, this is the rule laid down by the Ohio Supreme Court in *Lott*.

relationships between the deceased murder victim's family and the judicial system of Trumbull County.[10]

Following a status conference on August 13, 2003, the undersigned judge, commissioned to hear this case, ordered that all issues previously addressed be presented anew, inasmuch as the final procedures for conducting an *Atkins* hearing had not been settled.

B. Procedural History of the Underlying Case

Danny Lee Hill was tried before a three-judge panel in the Trumbull County Court of Common Pleas in January/February, 1986 for the torture and murder of Raymond Fife. Hill was found guilty of kidnapping, rape, aggravated arson, felonious sexual penetration, and aggravated murder with specifications. Following the mitigation phase of the trial, the court sentenced Hill to a term of years (10 to 25) for both aggravated arson and kidnapping; life imprisonment for rape and felonious sexual penetration; and the sentence of death for aggravated murder with specifications.

The Ohio Court of Appeals affirmed Hill's conviction.[11] (11th Dist. Case Nos. 3720, 3745, 1989

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[10] Mrs. Miriam Fife, the mother of the murder victim is currently employed as the courtroom advocate for the Victim/Witness Division of the Trumbull County Prosecutor's Office. She therefore has reason to be in contact with the judicial system of the county; she is in and about the courthouse frequently in connection with her official duties.

[11] The Ohio Constitution was to be later amended in 1994, thereby eliminating direct appeals to intermediate appellate courts in capital cases, in favor of appeals "as a matter of right" from the trial court directly to the Supreme Court of Ohio. Ohio Const. Article IV, Sec.2. This provision applies to capital crimes committed on and after January 1, 1995. The Ohio Court of

Ohio App.LEXIS 4462.) In turn, that judgment of the Court of Appeals was affirmed by the Ohio Supreme Court. *State v. Hill*, 64 Ohio St.3d 313 (1992). The Supreme Court of the United States denied *certiorari*. 501 U.S. 1007 (1992).

Following the exhaustion of direct appeals, Hill embarked on collateral petition and motion practice, first in state courts and then in federal courts. While challenging his conviction in collateral proceedings before the U.S. Court of Appeals in 2002, the U.S. Supreme Court decided *Atkins v. Virginia*.

C. The Petitioner's Motion Practice on his Atkins Claim

Of the various and sundry motions filed by the Petitioner, most have been resolved to his satisfaction. However, there are four in number that bear close attention. They are: first, a motion to void the death sentence under res judicata (the doctrine of issue preclusion); second, a motion to fix the time frame (and limit the evidence for the determination of MR) to the time-period for both the crime and the trial; third, the motion to convene a jury as the fact finder; and, fourth, the appointment by this court of a third expert to examine the Petitioner.

1. Motion to void the death sentence. The task before this court is to apply the substantive law of *Atkins*, within the framework of procedural due process outlined in *Lott*, in order to determine whether Danny Lee Hill is "mentally retarded" for

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Appeals, therefore, retains appellate jurisdiction of this case. It also retains jurisdiction of collateral attacks upon all criminal convictions, including those in capital cases where the offense date is after 1-1-95.

purposes of escaping execution.[12] The petitioner's contention that his death sentence should be declared void is, in effect, a request for declaratory judgment that he is "mentally retarded." Because one of the issues in the underlying case related to the claim of mental retardation of the petitioner, and, further, since appellate review of his conviction and sentence alluded to the defense of mental retardation, the petitioner claims that mental retardation is a "proven fact." As such, the petitioner claims "that the State of Ohio is barred by the doctrine of collateral estoppel from any attempt to relitigate the proven fact" of his mental retardation. The history of this murder case does include references to Hill's claim of mental retardation, and the corresponding judicial commentary of his deficient mental aptitude; but that issue is in a context different from "mental retardation" of the *Atkins* variety. For purposes of analysis, **MR**, or mental retardation in quotes, will be descriptive of a condition in the context of Eighth Amendment/*Atkins* substantive constitutional law. The petitioner's earlier claims of mental retardation (during the pre-trial and trial phases of the underlying case) related to voluntariness of statements, waiver of counsel at an investigatory stage, and waiver of *Miranda* rights, all of this to have been later weighed against the backdrop of a specific finding by the Ohio Supreme Court that the "defendant's mental aptitude did not undercut" the voluntariness of his

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[12] The term "mental retardation" is used in quotes to signify a term of art in the context of *Atkins v. Virginia* and the Eighth Amendment's proscription against cruel and unusual punishment. See *Lott*, 97 Ohio St.3d at 304.

statements, or the intelligence of his waivers. 64 Ohio St.3d at 318. It is true, also, that the Ohio Supreme Court, in addressing the statutory mitigating factors of R.C. §2929.04, stated: "[we find that defendant's mental retardation is a possible mitigating factor." 64 Ohio St.3d at 336. Referring to *Penry v. Lynaugh* (1989) 492 U.S. 392, the Ohio Supreme Court acknowledged the existence of various levels of mental retardation, and then went on to find "a very tenuous relationship between the acts he [Danny Lee Hill] committed and his level of mental retardation."[13] The Ohio Supreme Court concluded beyond a reasonable doubt that the possible mitigating factor of mental retardation was outweighed by the aggravating factors; and further that the death sentence was neither excessive nor disproportionate.

In arguing for collateral estoppel, the petitioner is invoking what is now termed the doctrine of issue preclusion.

> The doctrine of **issue preclusion,** also known as collateral estoppel, holds that a fact or a

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[13] This observation by the Ohio Supreme Court should not be viewed as an adoption of the so-called "nexus test," a test condemned by the U.S. Supreme Court. The nexus test required a showing that the underlying *facts* of the capital conviction be connected to (or be the product of) mental retardation, in order for the MR defense to be validated. On the other hand, the rejection of the nexus test would not prevent a fact-finder from considering the probative merit of the facts of the crime, whether those facts can best be understood in the context of (or as the product of) MR, or otherwise. The nexus test loses constitutional validity because it renders an MR diagnosis inoperative unless supported by the peculiar facts of the case. See further discussion, *infra*.

> point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different." *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395, 692 N.E.2d 140; *Norwood v. McDonald* (1943), 142 Ohio St. 299, 27 O.O. 240, 52 N.E.2d 67, paragraph three of the syllabus. Consequently, collateral estoppel prevents parties from relitigating in a subsequent case facts and issues that were fully litigated in a previous case. *State ex rel. Shemo v. Mayfield Hts.* (2002), 95 Ohio St.3d 59, 64, 765 N.E.2d 345. (Emphasis added.)

State ex rel. Stacy v. Batavia Local School Dist. Bd. of Ed. (2002) 97 Ohio St. 3d 269.

And *see State v. Bey* (1999), 85 Ohio St.3d 487, 491:

> Bey is collaterally estopped from relitigating the issue of whether the evidence admitted at the Mihas trial was admitted in error because this issue was already fully and finally litigated by the same parties involved in this case -- the state and Bey. *State v. Bryant-Bey, supra. See Thompson v. Wing* (1994), 70 Ohio St.3d 176, 183, 637 N.E.2d 917, 923 ("Collateral estoppel **[issue preclusion]** prevents parties * * * from relitigating facts and issues in a subsequent suit that were fully litigated in a prior suit."); *Scholler v. Scholler*

(1984), 10 Ohio St.3d 98, 10 OBR 426, 462 N.E.2d 158, paragraph three of the syllabus; *see, also, Ashe v. Swenson* (1970), 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469, 475, cited with approval in *State v. Lovejoy* (1997), 79 Ohio St.3d 440, 452-453, 683 N.E.2d 1112, 1121 (establishing that collateral estoppel is relevant in criminal cases). (The preceding parentheses are the Supreme Court's.)

Issue preclusion, if applicable here, could just as easily be argued in favor of the State; for in every context in which he was evaluated at trial and through the direct appellate process, the petitioner's acknowledged deficient mental aptitude did not profoundly interfere with the outcome of the ultimate judicial process. When viewed in this light, the petitioner would be reasonable in asserting that the issue of MR has not been litigated.

There are additional reasons that prevent the application of issue preclusion, not the least of which is that MR has constitutional dimensions and constitutional imperatives. The MR makeup, the precise definitional standard, the constitutional fundamentals—these are all in a context different from the myriad situations in which mental retardation then and even now drives the resolution of issues other than the Eighth Amendment.[14] In

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[14] In remanding *Atkins* back to the Virginia Supreme Court, Justice Stevens noted that the Commonwealth of Virginia disputes the MR claim of that defendant. Justice Stevens added: "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." 536 U.S. at 317.

essence, then, MR has been scientifically, psychologically, and artfully (in the legal sense) defined in a fresh light. Plainly, for Hill, the MR issue is being litigated at this time for the first time. "*Atkins* established the **new standard** for mental retardation." (Emphasis added). *Lott*, 97 Ohio St.3d at 306.[15] Here is what the 6th Circuit had to say in remanding Hill's habeas petition to the district court for referral to state court:

> The Supreme Court's decision to return Atkins's case to state courts suggests that we should return Hill's Eighth Amendment retardation claim to the state for further proceedings. Here, as in Atkins, the state of Ohio has not formally conceded that the petitioner is retarded. Though Ohio courts reviewing his case have concluded that Danny Hill is retarded, *see, e.g.*, *Hill*, 595 N.E.2d at 901, and voluminous expert testimony supported this conclusion, J.A. at 3264-67, 3332-35, 3379-80, Hill's retardation claim has not been exhausted or conceded. Ohio should have the opportunity to develop its own procedures for determining whether a particular claimant is retarded and ineligible for death. We note that, when discussing retardation in Atkins, the Supreme Court cited with approval psychologists' and psychiatrists' **"clinical definitions of mental retardation,"** and presumably expected that states will adhere to these clinically accepted definitions when evaluating

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[15] Henceforth reference to *State v Lott* will be thus: *Lott* at [pg].

an individual's claim to be retarded. *See* 122 S.Ct. at 2245 n.3, 2250-2251. (Emphasis added in bold type.)

300 F.3d at 682.

And, in a different context (that relating to the issue of a coerced confession), the 6th Circuit in the same opinion, had this to say about Hill being retarded.

According to the record, Hill first came to the attention of police when he inquired about a reward offered for information on Raymond Fife's death. Questioned twice, he consistently denied any involvement in the killing. Then his uncle was assigned to the case. After being brought to the station again and left alone with his uncle for a few minutes, Danny Hill made an abrupt about-face and confessed to involvement in the crime. In evaluating these events, Danny Hill's previous interactions with his uncle are important: twice before, when Hill was in police custody, his uncle struck him when he refused to talk. Even accepting his uncle's version of events, in which Detective Hill simply told Danny Hill he believed he was involved in the killing, this episode raises a serious question of coercion. That any officer had struck a suspect is troubling; of special concern here is that Danny Hill was struck by an officer who was also a close family member.

A suspect's "mental condition is surely relevant to an individual's susceptibility to police coercion." *Colorado v. Connelly*, 479 U.S. 157, 165 (1986). State courts, including the

> Ohio Supreme Court, have clearly stated that Hill is retarded. *See Hill*, 595 N.E.2d at 901. The retarded have, "by definition ... diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 122 S.Ct. at 2250. *See also* Morgan Cloud et al., Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects, 69 U. Chi. L. Rev. 495, 511-12 (2002) (noting that the retarded are "unusually susceptible to the perceived wishes of authority figures ... ," have "a generalized desire to please ... ," "are often unable to discern when they are in an adversarial situation ... , " and "have difficulty distinguishing between the fact and the appearance of friendliness"); Welsh S. White, What is an Involuntary Confession Now?, 50 Rutgers L. Rev. 2001, 2044 (1998) (stating there is "ample support for [the] conclusion that mentally handicapped suspects are 'especially vulnerable to the pressures of accusatorial interrogation'.").
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> 300 F.3d at 682-683

The Ohio Supreme Court did address the confession in several different contexts, including the involvement of Petitioner's uncle. The Court concluded there were no constitutional impediments to admissibility. That issue is not before this court and would appear to be res judicata, at least in state court proceedings. Evidently, the Sixth Circuit will

re-visit this issue. From the standpoint of an Atkins hearing, it must be noted that a diagnosis of MR does not exculpate a criminal from conviction and punishment. An MR diagnosis insulates against capital punishment. Justice Stevens rendered it abundantly clear in his introductory remarks to the *Atkins* case that MR is an escape hatch only from the capital penalty This court is not prepared to say whether "clinical definitions of mental retardation," are to be applied in resolving confession issues and other issues. What seems clear, however, is that in the context of the 8th Amendment, the Supreme Court of the United States has suggested a forensic definition in determining the existence of mental retardation; further, that the 6th Circuit has concluded that Danny Lee Hill's mental retardation claim has not been exhausted and has not been conceded by the State.

2. Motion to fix the time frame. The Petitioner has sought to limit the hearing and the evidence to a particular time frame, that being the time-period of the crime and of the trial itself. In fact, however, the Petitioner would include as evidence periods of time well before the crimes occurred. An additional inconsistency in Petitioner's time-frame-argument is his effort to suppress entirely the facts of the underlying crimes, even though he seeks to fix the inspection of his mental acuity to the time period of the capital murder. However, both the logic and the syntax of the cases in Ohio and elsewhere favor a totality-of-the-evidence test for an examination of the **current** condition of the prisoner. Nevertheless, by definition, a retrospective analysis of a psychological profile is necessary in order to conclude the diagnosis. This is so, because the manifestations of

MR (or better phrased, its onset) must occur before age 18.

It would seem that time frame issues are best resolved on a case-by-case basis, by taking into account the available evidence under the particular facts of each case. For example, the capital defendant in the bellwether decision of *Atkins v. Virginia*, was convicted of abduction, armed robbery, and capital murder committed in August 1996. The high court issued its opinion in June 2002. The time span between the date of the crime and the date of the Supreme Court decision is relatively narrow, but even here the analysis must look further back for onset before age 18. The implication of *Atkins*—arguably the direct holding—is "that death is not suitable punishment for a mentally retarded criminal." 536 U.S. at 321; *viz.*, for a criminal who is ***now*** mentally retarded, **since before age 18**. The national consensus, about which Justice Stevens wrote in *Atkins v. Virginia*, and which the high court translated into Eighth Amendment jurisprudence, relates to a "**range** of mentally retarded offenders." (Emphasis added.) 536 U.S. at 348. Justice Stevens was referring to offenders who meet the clinical definition of mental retardation—a precise definition satisfying three specific criteria. A capital offender who, for one reason or another, does not fall within that definition, is not **now** "so impaired as to fall within the range" of those about whom there is a national consensus. All of which is to say that the judicial inquiry is in the present tense, with a look back to onset before age 18. In issuing its decision, the Court in *Atkins* is incorporating clinical definitions to define the protected range.

On the other hand, Gregory Lott, of *State v. Lott*, committed aggravated murder in the late 1980s. The Ohio Supreme Court decided his *Atkins* claim case in 2002. The opinion is replete with syntax in the present tense. The issue is whether Lott ***is*** mentally retarded. Cases in other jurisdictions support the proposition that the correct inquiry is whether the petitioner *is or is not now mentally retarded.*[16] Given the manifestation rule, any dispute relating to time frame may be a distinction without a difference, for, whatever the available evidence may be, MR is defined in three critical parts, including a time frame before age 18. It seems to this court that the best way to explore any diagnosis of MR is by applying the totality-of-the-evidence test. Any diagnosis is the product of the *available* probative evidence. Typically, this evidence is drawn from various time frames.[17] In the final analysis, two observations seem to support the totality-of-the-evidence test: first, it is for the forensic psychologists to determine whether they are able to draw conclusions from available evidence, and are able professionally to consider whether particular evidence is probative, based upon

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[16] See *State ex rel. Edwards v Cain,* (Louisiana Sup Ct. 2003) 841 So.2d 768, 2003 WL 142041. *Clark v. State* (Alabama Ct of Crim. Appeals 2003) 2003 WL 559401. See also *United States v. Webster,* 421 F. 3d 308 (5th Cir. 2005), implicitly following a totality-of-the-evidence test, including evaluating present anecdotal evidence.

[17] Sometimes, the courts refer to MR is the past tense, holding, for example, that a defendant was or was not mentally retarded. See, for example, *State v. Were,* 2005-Ohio-376 (Hamilton Cty, C.A.1). Yet even here, the courts consider evidence from a wide-ranging time frame, even up to the present.

time lines and otherwise. In other words, it is for the experts to evaluate a transparent record, as opposed to an opaque one; and, second, in the absence of meaningful probative evidence of a head injury suffered after the age of 18, the forensic experts fairly well agree that MR, (that is, mental retardation forensically defined by its three parts) is not likely to change—up or down—with age. What the Petitioner has sought is a sanitized record, a record devoid of recent evidence and considerable parts of the past—a record both selective and restrictive.

3. Motion to convene a jury as the Atkins fact-finder. The petitioner claims entitlement to a jury on the issue of mental retardation. This court is being asked to reject outright the specific directive of the Ohio Supreme Court in *Lott*. The United States Supreme Court has left it to the several States to fashion remedies for resolving MR claims—those retrospectively, as in the instant case, and those for capital crime trials in the future. Under the ruling of the Ohio Supreme Court, neither situation allows for a jury trial in resolving the limited issue of mental retardation in the Eighth Amendment context. While it is correct that mental retardation may be a relevant issue in other contexts—some resolved by the judge (for example, in a suppression issue on the voluntariness of a confession), and some resolved by the jury (for example, in the mitigation phase of a capital conviction)—the Supreme Court of Ohio has ruled that the procedures for post conviction relief outlined in R.C. §2953.21 *et seq.* provide a "suitable statutory framework for reviewing" MR claims. The Court has likened the *Atkins* inquiry to a ruling on competency, in which the judge, not the jury, decides

the issue. *Lott* at 306. Thus, whether analogized to postconviction relief issues or competency claims—in neither event (under the Ohio statutes) is the petitioner entitled to a jury determination. Furthermore, under the prospective application of *Atkins* (*viz.*, for crimes committed post-*Atkins*) the issue of mental retardation is visited and revisited in layers: first, as a judge-driven issue for MR in an Eighth Amendment setting; secondly, in regard to suppression issues (also for the judge); and thirdly for the jury in its consideration of mitigation. In each instance, a defendant is at liberty to cast mental retardation in a different light. When the topic of mental retardation is viewed in this tapestry as a whole, it becomes abundantly clear that the analogy of the competency issue to an *Atkins* claim makes perfectly good sense. Indeed, even Justice Thurgood Marshall is on record emphatically favoring judges over juries in deciding issues of competency—particularly, and especially as they involve issues of mental retardation.[18]

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[18] See *White v. Estelle* (1983) 459 U.S. 1118, Justice Marshall dissenting from the Court's denial of certiorari to the 5th Circuit The case involved a Texas State trial judge, who, pursuant to the Texas statutory scheme, impaneled a jury to determine the defendant's competency to stand trial on a charge of capital murder. The Justice stated: "**I have little doubt that a judge ordinarily is better qualified to resolve the constitutional question on the basis of whatever facts are found.**" 459 U.S.at 1125. The defendant was evaluated in the context of borderline mental retardation. The jury found him competent to stand trial. The defendant was then tried and convicted by another jury. Justice Marshall also observed that a defendant's mental condition "**must be considered in the context of the totality of the circumstances.**" *Id* at 1125 (Emphasis in bold).

Recently, the United States Supreme Court, in a per curiam opinion, reversed and remanded a decision of the U.S. Court of Appeals for the 9th Circuit mandating a jury trial on Atkins issues. Remarking that Arizona "had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition," the High Court held that the 9th Circuit "exceeded its limited authority on habeas review ...."[19] Yet the Supreme Court left the door open to such a challenge in a proper procedural setting, presumably a proceeding on direct appeal, as opposed to Habeas Corpus. However, even the United States Congress, in its chapter dealing with federal capital prosecutions, provides for judge determination of MR, as opposed to that of a jury.[20] Therefore, in accordance with the directives of the Ohio Supreme Court, this court has reviewed the Petitioner's Atkins claim within the framework of the Ohio statutes dealing with post conviction relief—without a jury.

4. Motion to Limit the Appointment of Experts. During the pre-hearing stages of this case, the Petitioner argued that the trial court should not "intrude upon the adversarial process by appointing its own expert. The context within which the petitioner's argument is framed is inaccurate in two respects: First, the Ohio Supreme Court, responding to the directives of the United States Supreme Court,

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[19] See *Schirio v. Smith*, _U.S._, 2005 WL 2614879.

[20] Chapter 228, Death Sentence, 18 U.S.C. 3591 through 3598, especially 3596(c). For an application of the statute, see *United States v. Webster*, 421 F.3d 308 (5th Cir. 2005). Notably these statutes pre-date *Atkins* by several years.

established the procedures for trial court hearings on *Atkins* claims. In doing so, our State high court observed, "the trial court's ruling on mental retardation should be conducted in a manner comparable to a ruling on competency (i.e., the judge not the jury, decides the issue.)" *Lott* at 306. But, there is more to this observation than the issue of judge versus jury. The Ohio Supreme Court established substant e standards and procedural guidelines "in determining whether convicted defendants facing the death penalty are mentally retarded." *Id.*, at 306. It did so "in the absence of a statutory framework to determine mental retardation." By comparing the process favorably to rulings on competency, the Ohio Supreme Court invoked the statutory process contained in Chapter 2945 of the Ohio Revised Code. Some of these statutory provisions include mental retardation in the pre-*Atkins* context, which is to say in other than Eighth Amendment settings.[21] But to say that trial

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[21] *Atkins* has not eliminated mental retardation in settings other than Eighth Amendment jurisprudence. *Atkins* has merely added another a new constitutional dimension. Some of these issues of mental retardation are to be resolved by judges; for example: on issues of voluntariness of confessions and Miranda warnings, as well as in consent situations in warrantless search cases—all of these in the pre-trial motion-to-suppress-stage, in which the mental retardation issue increases the judicial scrutiny of both intelligent waiver and/or intimidation issues. Included in this pre-trial stage, henceforth in future cases would be the motion practice of the *Atkins* variety. Other issues of mental retardation may come into play for the jury during the during both guilt and penalty phases of capital jurisprudence. See R.C. §2929.04, criteria for imposing death or imprisonment for a capital offense. Eventually, appellate guidance will assist the trial court in its application of the full range of mental retardation issues.

judges are intruding into the adversary process by appointing examiners is to miss the role of the court in overseeing resolution of the full array of pre-trial mental health issues in criminal jurisprudence-including issues of competency, sanity, mental retardation, and even "battered woman syndrome." Ordinarily it is the court and the court alone, which appoints examiners, irrespective of the number of examiners.[22] This is explicit in the statutory scheme of RC. §§294S.37; .371; and .38. Thus, the argument that the court is intruding into the adversary process, when it appoints a third examiner, has no more traction than when the court appoints only one examiner. Second, when the trial court appoints an examiner under the statutory scheme, the psychiatrist or psychologist, as the case may be, is not necessarily the court's witness. R.C. §2945.371 (as amended 2-20-2002) contemplates a variety of situations occurring in which one, two, **three or more examiners** are appointed by the court.[23] In the experience of this court, the more typical situation occurs when the trial court appoints only one expert, whose opinion is generally accepted and whose written report is stipulated and accepted as record-evidence by both the State and the defendant. But not all situations are typical, as the State has

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[22] The situation is rare when a defendant is able to afford his or her own examiner. And the State is ordinarily powerless to examine the mental health of a defendant, in the absence of a court order that the defendant submit to an examination.

[23] "Examiner" is a term of art defined as a psychiatrist or licensed clinical psychologist; except that "[f]or purposes of a separate mental retardation evaluation," [as opposed to issues of competency and sanity] the law requires a licensed clinical psychologist. R.C. §2945.37(A)(2)(b).

enumerated in its brief.[24] For the more serious charges of homicide and attempted homicide the appointment of multiple examiners is not out of the ordinary and rarely opposed. Notably RC. 2945.371, prior to the amendments of 2-20-2002, provided for "one or more, but not more than three evaluations of the defendant's mental condition." This is now changed to "one or more," without reference to a cap. The inference is obvious: more than three examiners may be appointed, although at some point the matter of discretion comes into play. This statutory scheme does not change the nature of the proceeding from adversarial to inquisitional.

This court has rejected the characterization that a third expert is "the court's own inquisitional agent." See Petitioner's Motion Regarding Procedural and Substantive Matters ... [etc] at p.23. Having established that the appointment of three mental health experts is not only permissible, but also fairly common in homicide cases, the question was whether this court should exercise its discretion and appoint a

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[24] In response this court's request for additional briefs on this issue, the State pointed to several instances in which three or even more than three mental health professionals have testified on competency/sanity issues. See, e.g., *State v. Carter* (2000), 89 Ohio St3d 593, a capital case tried in Trumbull County, involving three examiners. Also, four examiners were employed in *State v. Jeffrey Hill* (1995) 73 Ohio St3d 433, 446-47, sentenced to death for the aggravated murder of his mother in Hamilton County. Other examples were cited in Cuyahoga County. See "State's Brief Regarding the Number and Source of Mental Health Examiners," filed December 12, 2003. Also, see *State v. Yusef De Jarnette*, CR 428306, a stipulated verdict of not guilty by reason of insanity on 12-02-2003, on a four count attempted aggravated murder case in which three examiners were appointed by the trial judge.

third examiner. Several reasons favored the appointment of a third examiner-an independent one that would abide no allegiance to either side (whether in fact or by appearance)—. First, *Atkins* hearings are cases of first impression-involving as they do a new constitutional right. Secondly, MR in its classic sense is a term of art—a tripartite test, different from, though related to, mental retardation in its historical/legal sense. Mental retardation has its ranges. Not all who claim to be mentally retarded are said to be protected by Eighth Amendment jurisprudence. Thirdly, because this is a death penalty case, a diligent approach is important to the State and to the Petitioner. In the final analysis, whether a death row defendant should be spared the capital penalty is a decision for the court, subject to review by the higher courts. In view of the magnitude of the judicial burden, the appointment of a third expert was deemed to be appropriate. But, in order to avoid the appearance of any impropriety in the selection process, this court designated Gerald L Heinbaugh, Executive Director of the Forensic Psychiatric Center of Northeast Ohio Inc. (FPCNO) of Youngstown to select the third examiner, a psychologist who satisfied the legal definition set forth in R.C. §2945.37(A)(2)(b).

Mr. Heinbaugh was instructed to insure that the psychologist selected have had no dealings whatsoever with the victim's family. He selected Dr. Nancy Huntsman as the third expert. As it developed, this court agreed to compensate an additional expert to testify in behalf of the Petitioner—Dr. Sparrow, a distinguished academician. Dr. Sparrow was called in rebuttal,

prompting the State, in surrebuttal, to re-call Dr. Olley and to call Dr. Hancock.

D. Miscellaneous Events Surrounding the Atkins Hearing

The staging of this Atkins hearing to a conclusion for Petitioner Danny Lee Hill has been a rocky road of disruptions, and unpredictable events. Yet, a complete record has been generated, together with the testimony of an impressive array of forensic experts both for and against the proposition that the Petitioner is mentally retarded.

Over the years, beginning with the original trial of his case, in early 1986, Danny Lee Hill has been afforded many different attorneys. The full panoply of counsel has been recited in a judgment entry of this court dated November 8, 2004. Eventually, Hill filed a federal habeas corpus action in the Northern District of Ohio with the assistance of yet another appointed counsel, who withdrew when the district court denied the petition on its merits. With the dismissal of federal habeas corpus by the district judge in the Northern District of Ohio, the Ohio Public Defender in Columbus (OPD) entered an appearance in order to prosecute an appeal to the United States Court of Appeals for the 6th Circuit in Cincinnati. Two OPD attorneys began working on the appeal but withdrew for what is said to be an "impasse" with Hill. The 6th Circuit appointed Cincinnati private counsel from the firm of Dinsmore & Shoal. In the meantime, the Supreme Court decided the *Atkins* case, prompting the 6th Circuit to remand the petition to the district court, in turn, with instructions to refer the matter to state court on the *Atkins* claim. Because the 6th Circuit set a

deadline for the filing of the Atkins claim in state court, the attorneys from Dinsmore and Shoal (Mark A. Vander Laan, Esquire) filed preliminary notice papers with the Clerk of the Trumbull County Court of Common Pleas on November 6, 2002, asking the court to appoint new counsel for Hill. Gregory Meyers, of the Columbus office of OPD eventually entered an appearance. Meyers devotes 100% of his professional career to capital jurisprudence. He is a senior attorney at OPD with various supervisory titles, and he is fully certified. He is a prodigious practitioner.

With the beginning of the new year of 2003, the attorney-client situation for Danny Lee Hill seemed to be settled with Public Defender Meyers fully in charge.[25] In the meantime, Judge Andrew Logan was attending to procedural housekeeping issues surrounding *Atkins* hearings, and Meyers, for his client, was authoring extensive motion practice.

In early May, 2003, the attorney-client situation again came into question with the filing by Meyers of two pleadings: the first, a so-called "Notification of Petitioner's Desire for New Counsel;" and the second, a "Motion to Remove the Ohio Public Defender and Appoint Counsel From the Private Bar." Also, Danny Lee Hill, *pro se*, sent a letter to Judge Logan, requesting the dismissal of Gregory Meyers in favor

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[25] Judge Logan entered an order in January excusing local public defenders James Lewis and Lewis's assistant Anthony V. Consoldane, Esquire. Lewis was one the attorneys who represented Danny Lee Hill before the three-judge panel that convicted him. Lewis is now the Director of the Trumbull County Public Defender's Office. This is a branch office of the Ohio Public Defender.

of two local private attorneys: Roger Bauer, Esquire and Maridee Costanzo. At the time, both were certified capital jurisprudence attorneys—Costanzo, 1st chair, and Bauer, 2d chair.

At a hearing in open court on May 22, 2003, at which the Petitioner Danny Hill was present, Judge Logan announced that he had received correspondence directly from the Petitioner, requesting the dismissal of Gregory Meyers in favor of Bauer and Costanzo. The court treated Hill's letter as a motion; and the hearing was held to resolve the issues raised by the Petitioner's request. Critical in the view of Judge Logan was the overarching issue of cashiering one of Ohio's leading experts in capital jurisprudence, in favor of two local lawyers, who had neither the time nor the resources to match the full-time senior state public defender.[26]

Judge Logan conducted a thorough inquiry into the issue of attorney representation. The record of the proceedings indicates that the Petitioner's "*pro se*" document was prepared—in the Petitioner's own words—by "death row legal services." As explained by Attorney Meyers: "[D]eath row services is just jailhouse lawyers literally." Tr. of 5-22-03 at 5.

The Petitioner acknowledged that Meyers has *never* previously represented him at any stage of the case pre-*Atkins*. Meyers was a fresh hand in these proceedings. He is by job description and otherwise independent of the local office of OPD and a superior

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[26] Meyers devotes 100% of his professional practice to capital jurisprudence; and he has done so for many years. On the other hand, Costanzo and Bauer are busy general trial lawyers in private practice—both civil and criminal.

officer to any assistant public defender with any past connection to Hill. On the other hand, both Attorney Bauer and Attorney Costanzo did have connections with the Trumbull County Public Defender's Office as independent contractors—a connection which should have been troubling to Hill, given his wariness of the local OPD.[27] Attorney Bauer, for himself and his spouse, Attorney Costanzo, agreed to serve as pro bono counsel *only with the understanding that Attorney Meyers remain on this file as lead counsel.* This was satisfactory to Hill, who executed a waiver entitled:

"Petitioner Hill's Waiver Of Any Potential Conflict With Representation By Attorneys Affiliated with the Office of The Ohio Public Defender"

This document was filed with the Clerk of Courts of Trumbull County on May 22, 2003. Everyone understood that the laboring oar on this file was to be pulled by Meyers. In fact, the entree of Costanzo and Bauer was contingent on Meyers remaining as lead counsel. In spite of the waivers, thoughtfully, carefully, and deliberately given by the Petitioner and his attorneys,[28] Bauer filed a perfunctory motion to withdraw five months later in October 2003. He

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[27] The petitioner is adverse and antagonistic toward his uncle, Morris Hill, an investigator for the local office of OPD. See footnote 4, *infra.*

[28] Attorney Costanzo did not attend the hearing of May 22, 2003, the date of the waiver affidavit. Thus, she did not countersign the affidavit. She did, however, attend later hearings. Reportedly, she also spoke with Hill on May 22 via cell phone while Meyers and Bauer were present with Hill and she and Hill agreed to the arrangement. Tr. of 4-15-04, at 12.

sought leave of court to withdraw as counsel for the Petitioner **"for the reason that a conflict of interest exists that will be explained at a later date."** At a hearing staged on November 17, 2003, (which had been scheduled for other purposes) this court conducted its own inquiry on the issue of Roger Bauer's Motion to Withdraw. This court called on Mr. Bauer "to show his hand."[29] Because Mr. Bauer was reluctant to state the reasons supporting a conflict of interest, the court offered to hear his explanation *in camera*, provided that the State and Public Defender Meyers were in agreement with such a procedure. Both the county prosecutor and the State public defender consented to the procedure; and they both expressed satisfaction with the court's decision to excuse Bauer. Costanzo was not present at the hearing.

During the *in camera* session, Bauer described two situations warranting his departure from the case—both of which were eventually disclosed in open court by the Petitioner himself as well as his attorney Gregory Meyers. The first topic to be disclosed was an unsworn "Affidavit" to the Federal Bureau of Investigation in which the Petitioner has accused both his Uncle Morris and the Trumbull County Prosecutor of criminal mischief and misconduct. Bauer advised, *in camera*, that he had developed a friendship with Morris Hill and had

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[29] See *United States v. Illes*, (6th Cir.) 906 F.2d 1122, holding that a criminal case defendant dissatisfied with his counsel must in the least offer a reason for dissatisfaction. An attorney seeking permission to withdraw should do the same, so long as the explanation does not offend the confidential nature of the relationship.

become uncomfortable with representing Danny Lee Hill. Evidently, Bauer had only recently come to realize that Danny was making an issue of Morris Hill. For whatever reason, Bauer was evidently ignorant of the confession issue involving Morris Hill, identified by the U.S. Sixth Circuit in its opinion in the federal habeas corpus case. Given the history of Danny's antagonism toward the local office of OPD, especially because his Uncle Morris is now an investigator for that office, Bauer's discomfort, itself, warranted his removal. Furthermore, Bauer's actual involvement in the instant case, beyond his initial recusal motion practice, was *de minimus*. But Bauer's disclosure of his friendship with Morris Hill paled in comparison to the next disclosure. Bauer related that he had recently developed a personal relationship with Connie Jenkins, a rape victim of Danny Lee Hill and a witness for the prosecution in Hill's capital murder trial. Given that disclosure, this court advised Bauer that he was excused from the case. The court would not know the true circumstance of Bauer's entree into this case until later. That would come during what was a routine status conference scheduled for April 15, 2004.

The hearing of April 15, 2004 was originally scheduled as a housekeeping session to discuss procedures for implementing this court's prior orders surrounding IQ testing and related evidence-gathering on the issue of mental retardation. Instead, the issue of attorney representation once again took center stage.[30] Although Costanzo was expected to attend the hearing, she was engaged in a

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[30] Attorney Bauer was excused from the file in November of 2003, following the *in camera* disclosures.

protracted federal criminal RICO trial in Toledo where she was temporarily lodging. Her perfunctory motion to withdraw from the case *sub judice* was actually prepared by Meyers, who also reported that he (Myers) had reached an "intractable impasse" with his client. During the hearing, Meyers disclosed both a remarkable and an incredulous situation in which the *raison d'etre* for Bauer and Costanzo "was to undertake a [separate] path of litigation of Mr. Hill's desire that I [Myers] told them I would not [undertake]." (Tr. of 4-15-04 at 12.). Hill understood that this separate litigation was to explore his "actual innocence." (Tr. of 4-15-04 at 32.) Thus, Hill became upset with Bauer and Costanzo for their failure to pursue a separate legal attack on Hill's conviction.[31]

But there is more to the story. Hill became aware that Bauer was "having an affair with this woman, Connie Jenkins, who was a [rape victim] witness in

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[31] Whether such an attack could be pursued at this time under post conviction relief or federal habeas corpus is not before this court. But two observations are in order: first, innocence is not typically an issue in an *Atkins* hearing. Rather, the central issue is whether a death row prisoner is forensically mentally retarded and thus constitutionally ineligible for the punishment of death. Thus, the desired tactic would be explored, if at all, in a separate collateral attack; and second, the United Stated Court of Appeals for the 6th Circuit has placed Hill's federal habeas corpus in suspense, pending resolution of the *Atkins* claim in state court. That federal court of appeals has expressed concern about the confession issue. Whether the claim of innocence can be added to the pending federal action is not before this court of common pleas. In any event, the entree of Bauer and Costanzo in the instant action, if secretly to file a separate action, was both inappropriate and legally unnecessary.

my case." (Tr. of 4-15-04 at 32.) Hill learned this from an inmate "when I went over to the county jail." Hill stated that the family of the victim of his murder case "used this woman, Connie Jenkins, to get Roger Bauers [sic] off my case. And he fell for it."

At this same hearing, Hill related that a fellow death row inmate suggested that Hill retain Costanzo and Bauer to prove Hill's actual innocence. Thus, in the spring of 2003, Hill embarked on a plan to discharge Meyers in favor of Bauer and Costanzo. The reason was to explore and litigate Danny Lee Hill's claim of innocence—essentially to place the Atkins hearing in a secondary position.

In the spring of 2003, Judge Logan could not know what was behind the series of efforts beginning with the plan to discharge Meyers and ending (temporarily) with the addition of Bauer and Costanzo. Nor, for that matter, could Danny Lee Hill. It was not until the spring of 2004, when a fellow death-row inmate—said by Hill to have had a falling out with Costanzo—delivered to Hill a certain letter from Costanzo. The letter is addressed to Jason Getsy, a death row inmate at Mansfield.[32] The letter contains references to the Nineteenth Century German philosopher Friedrich Nietzsche and a 1960s LSD guru, Carlos Castenada. Costanzo expressed regret over her inability "to send you any more Nazi stuff," a reference said to be deeply troubling to Danny Lee Hill, once he became aware of the letter's

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[32] Getsy was convicted in Trumbull County of both aggravated murder and attempted aggravated murder in a botched murder-for-hire episode, in which the intended victim's mother was murdered as an eye witness to the break-in and shooting of her son. See *State v. Getsy*, (1998) 84 Ohio St.3d 180.

entire contents. In the midst of this missive, and wholly out of context in her description and reference to "just little pathetic individuals," Costanzo offered the following:

> If Danny Hill puts his foot down and writes a letter that says I want this woman, he's gonna [sic] get this woman. And Danny Lee Hill should send me a copy of the letter, so that if [Judge] Logan tries to squirm and weasel his way around, I can shove it [deleted .....]. So why don't you go over to his cell and have ol' Danny boy write a letter to Judge Logan. All it says is "I demand that Roger Bauer and Maridee Costanzo be appointed to me" and then make sure you send a copy of the letter to me.

The letter explains the entree of both Bauer and Costanzo. The Petitioner expressed satisfaction, **at the time** with the departure of both Costanzo and Bauer. His reasons:

- Bauer had struck up a relationship with a rape-victim-witness from Hill's original trial.
- Hill was offended by Costanzo's interest in Nazis; and
- Neither Bauer nor Costanzo had embarked on Hill's "innocence project."

When, in the spring of 2004, the attorney-client situation began to unravel, OPD in Columbus, on the one hand, and the Office of the Trumbull County Prosecutor, on the other hand, had been coordinating mutual testing and other housekeeping measures incident to a full blown *Atkins* hearing. In the absence of an articulated reason for excusing Meyers,

this court simply could not honor the desires of Hill. To allow the discharge of Meyers would leave the Petitioner without counsel—essentially to delay the *Atkins* effort for at least another year at the trial level and perhaps even to compromise the selection of the experts. The Petitioner had been unable to explain his dissatisfaction with Meyers, beyond the bare claim: "He lied to me." The Court inferred that the root of the disaffection was Meyers' refusal to participate in the "innocence project." It is also correct to note that Meyers, himself, has asked to be relieved. However, the court inferred that the request was in compliance with his client's wishes.[33] As an officer of the court, Meyers demonstrated both a focused and a vigorous approach in pursuit of the claim. And through eight days of hearings during the month of October 2004, the Petitioner openly cooperated with his two attorneys: Meyers and his OPD colleague Robert K. Lowe, Esquire.

Under the totality of circumstances, notwithstanding the bizarre cavalcade of events beginning the discharge of Meyers was considered unwarranted and unnecessary:

> To discharge a court-appointed attorney, the defendant must show a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel. *State v. Coleman* (1988), 37 Ohio St.3d 286, 525 N.E.2d 792, paragraph four of the syllabus.

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[33] At one point in the recent proceedings, there was a public disclosure that the Petitioner has just now lodged formal complaints against one or more attorneys with the Disciplinary Counsel.

> The term of art "actual conflict" refers not to a personality conflict but to a conflict of interest. *Strickland v. Washington* (1984), 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674, 696. The Sixth Amendment does not guarantee "rapport" or a **"meaningful relationship"** between client and counsel. *Morris v. Slappy* (1983), 461 U.S. I, 13-14, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610, 621. (Emphasis added.)
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> *State v. Henness* (1997), 79 Ohio St.3d 53.

The Petitioner, in the course of his many court appearances, was afforded considerable deference in the appointment of counsel. The Petitioner originally expressed a dislike and disdain for counsel from the local office of OPD. Yet, when it suited his own perceived interests, he was more than content to waive any objection to the appointment of Bauer and Costanzo, both affiliated with the local office as independent contractors. On the other hand, his personal differences with OPD at the seat of government in Columbus did not warrant the release of OPD's Senior Trial Counsel Gregory Meyers. The hostility and tension between attorney and client have come and gone, but only rarely have they been patently apparent. Nor has it interfered with counsel's due diligence. This court finds that the on-again-off-again conflict never eroded to the point of rendering the legal services ineffective. As noted in *Henness,* the issue of one's right to effective assistance of counsel can be judged by examining the attorney's due diligence. In that context, Meyers and Lowe have been vigorous. The demands of the Petitioner must be balanced against a rule of reason,

taking into account the nature of the case and the rights of the parties. In this case, the moving party is the Petitioner himself. But in a higher sense, this court is conducting the proceedings at the explicit order of the United States Court of Appeals for the 6th Circuit, and the implicit order of the Ohio Supreme Court, which laid out the ground rules for conducting such a hearing. Against these mandates, this court could not give deference to an unarticulated demand for the discharge of an attorney who is pursuing his duty skillfully and diligently.

It is important to note that there was neither an actual conflict of interest, nor an appearance of a conflict of interest, in regard to the representation of Danny Lee Hill by Gregory Meyers. Factors mandating disqualification would include an actual conflict, such as a prior representation against the same defendant. This is known as primary disqualification. On the other hand, imputed disqualification (also known as vicarious disqualification), can exist when a member of the same law firm has had a prior relationship with an opposing party—thus creating a rebuttable presumption of 'shared confidences.' Such a presumption can be rebutted by facts and circumstances, including the size and structure of the law firm, and the existence of a Chinese wall. See *Kala v. Aluminum Smelting & Refining Company, Inc.* (1998) 81 Ohio St.3d 1. But the fact that the OPD office has represented Danny Lee Hill unsuccessfully in the past creates a potential conflict only in a limited sense—such as ineffective assistance of trial and/or appellate counsel. Typically, such issues are tied to waiver and res

judicata in PCR petitions. See, for example, *State v. Lentz*, (1994) 70 Ohio St.3d 527. But ineffective assistance of counsel is not an issue in this case.

Furthermore, OPD is an arm of the Ohio Public Defender Commission, a State funded agency. (See Chapter 120 of the Ohio Revised Code.) Vicarious disqualification of government agencies or departments is to be avoided, since the ability of the government to function would be unreasonably impaired. Thus, the mere appearance of an impropriety is insufficient to disqualify an entire office. *State v. Vidu*, 1998 Ohio App. LEXIS 3390 (8th District). Rules are different in comparing a private law firm to the public defender. *Lentz, supra*, at 530. *Cf., Kala, supra.*

This is an *Atkins* hearing, requiring the litigation of a newly recognized 8th Amendment protection applied retroactively. This is a fresh issue. Gregory Meyers is a senior officer of OPD, with no prior contacts with the Petitioner. No one connected with OPD either locally or in Columbus, has ever been in conflict with the Petitioner. The absence of a "meaningful relationship" between Meyers and the Petitioner is insufficient to permit the termination of the attorney-client relationship. Furthermore, the Petitioner's relationship with his attorneys Meyers and Lowe improved demonstrably, and the parties demonstrated a cooperative professional relationship. It was only at the very last, during the end-stage of the proceeding that the Petitioner boycotted the proceedings. This was during the final argument stage of the hearing. Yes, there were some incidental events, typically prompted by the Petitioner's dissatisfaction with his temporary housing at the

penitentiary in Youngstown. And, even though this court permitted Attorney Bauer to withdraw and discharged Costanzo—both at the request of the Petitioner—this was not the end of Costanzo's meddling into the affairs of Danny Lee Hill.

A Howland Police Officer arrested attorney Maridee Costanzo during the early morning hours of March 19, 2005, while she was a passenger in a vehicle operated by a convicted felon. Costanzo was arrested and eventually indicted by the grand jury of Trumbull County on multiple weapons charges, together with obstruction of justice. This incident led to a federal investigation, culminating in her arrest on an interstate murder scheme. 18 U.S.C. 1958(a): *Use of interstate facilities in the commission of murder-for-hire*. According to the allegations, Maridee Costanzo entered into a contract for the murder of her husband, Attorney Roger Bauer, for the sum of four thousand dollars, of which eleven hundred dollars was actually delivered to the FBI informant. The conversations surrounding these transactions were wire recorded, and Costanzo was eventually to be sentenced to a substantial term of years in a federal penitentiary.[34]

As news of these events was unfolding, drawing considerable media attention, Petitioner Danny Lee Hill expressed agitation during a hearing on March

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[34] Costanzo was sentenced to a term of 96 months, plus 3 years of supervised release in a judgment entry filed 8-9-2005 in U.S. District Court (N.D. OH. Case No. 4:05CR00279-001). On 2-23-2005, she was sentenced on State charges in the Trumbull County Court of Common Pleas to a term of three years on a constellation of weapons and obstruction of justice charges concurrent with the federal sentence. (05-CR-289)

24, 2005, indicating his awareness of Costanzo's legal difficulties. He explained that Costanzo was supposed to be present on March 23 to testify in his behalf, as a witness, and that her failure to attend was preventing him from explaining details leading to the entree of Meyers, Costanzo and Bauer as his attorneys—why he (Danny Lee Hill) consented to having Meyers on board, and how Meyers had been violating Danny Lee Hill's constitutional rights. According to the Petitioner, he had recently received at least one letter from Costanzo, though she had been removed from the case many months ago.

Thus, at various times during the hearing dates, spread over many months, the Petitioner has had an up and down relationship with his attorneys Meyers and Lowe. In this respect, the history of his dissatisfaction with his numerous attorneys over some twenty years has been consistent. Nevertheless, the Petitioner's up and down relationship with Meyers has not deterred Meyers from representing Danny Lee Hill zealously within the bounds of the law.

V. THE EXPERTS ON MENTAL RETARDATION

A. Dr. David Hammer.

At the expense of the State this court appointed Petitioner Hill's choice of Dr. David Hammer as an expert witness on the central issue of mental retardation. Dr. Hammer is the Director of Psychology Services of the Nisonger Center, an institution affiliated with The Ohio State University. He is also a professor at the University. A state licensed clinical psychologist, Dr. Hammer received his Ph.D. from the University of Georgia in 1981 and

came to Ohio a few years later. Dr. Hammer's credentials as an expert in mental retardation are impressive. He is a longtime professor at Ohio State University, the recipient of numerous grants, and the author of some 50 or more articles or publications. Dr. Hammer has qualified on prior occasions as an expert witness, including cases involving capital jurisprudence.

B. Dr. J. Gregory Olley

The State selected as its expert Dr. J. Gregory Olley, Associate Director for the Clinical Center for the Study of Development and Learning at the University of North Carolina at Chapel Hill. Dr. Olley is also Clinical Professor in the Department of Allied Health Sciences at the University. He is a licensed psychologist, a Fellow of the American Association on Mental Retardation and a Director of the State Chapter of AAMR. Dr. Olley has testified in many capital cases in North Carolina, Illinois, and Louisiana. Like Dr. Hammer, Dr. Olley's appearance as an expert on MR in capital jurisprudence cases has been in behalf of death row defendants.[35] His credentials are impressive.

C. Dr. Nancy Huntsman

This court directed the Forensic Psychiatric Center of Northeast Ohio to select the third expert. The expert selected was Nancy Huntsman, Ph.D., a state licensed clinical psychologist, who received her doctorate in developmental psychology from the University of Michigan. She also taught at University of North Dakota; and then sought

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[35] Atkins Hearing Tr. Vol. II, p. 499-507.

retraining at Kent State University, where she changed her emphasis from academia to clinical pursuits. Dr. Huntsman specializes in court-ordered evaluations. She has performed some 250 evaluations over her career. Virtually all of her professional endeavors are directed at forensic psychology for various local government agencies—the City of Cleveland, the General Division and the Domestic Relations Division of the Cuyahoga County Court of Common Pleas, and for other state courts in Northeast Ohio. She is experienced in testing for IQs, did post graduate studies on mentally retarded issues, and has extensive experience in criminal jurisprudence. Her credentials are impressive.

D. Dr. Sara S. Sparrow

The Petitioner called Professor Sara S. Sparrow, Ph.D. of Yale University as a rebuttal witness. Holding a Connecticut license since 1971, Dr. Sparrow has for many years been affiliated with Yale. She rose through the ranks of academia to the position of full professor and for 25 years she was chair of the Child Study Center of Yale Medical School. Dr. Sparrow is currently Professor Emerita of Yale. She continues to be active in her profession—currently serving as President of Division 33 of the American Psychological Association.[36] She has published extensively in journals and has delivered numerous papers. A specialist in psychometrics,[37] Dr.

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[36] Division 33 relates to mental retardation and developmental disabilities.

[37] **Psychometrics** is defined as that "branch of psychology that deals with the design, administration and interpretation of quantitative tests for the measurement of psychological variables such as intelligence, aptitude, and personality traits.

Sparrow was one of three authors who revised the Vineland Social Maturity Scale in 1984, when Petitioner was 17 years old, and renamed it the Vineland Adaptive Behavior Scale.[38] Her credentials are impressive.

E. Dr. Timothy Hancock

The State called Timothy Hancock, Ph.D., as a witness in surrebuttal. Dr. Hancock is currently Executive Director of Parrish Street Clinic. He is also senior partner and founder of Psychometrics Research Associates, a research and test design firm located in Durham. A graduate of the University of Virginia, he received his doctorate in clinical psychology in 2000 from the University of North Carolina, Chapel Hill. He is a specialist in psychometrics, which be defines as "basically the art and science of mental measurement and test design."[39] He also defines psychometrics as "quantitative psychology." This sub-specialty is in addition to his certification as a clinical psychologist. Dr. Hancock's Parrish Street Clinic is a community health institution that serves patients with developmental disabilities. Dr. Hancock also deals regularly with law enforcement agencies and the courts in North Carolina. He also presents seminars at Duke University Law School on capital jurisprudence and mental retardation. He has a

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Also called **psychometry.**" The American Heritage Dictionary of the English Language, (41h. ed. 2000).

[38] E.A. Doll published the original Vineland in 1935 for the measurement of social competence. The scale was named for the City in New Jersey.

[39] Tr. at p. 294, March 24, 2005.

special interest in differential diagnosis between mental retardation and other cognitive illnesses. His credentials are impressive. In fact, with respect to all of the experts, it is difficult to imagine a more impressive array of forensic academicians and clinicians gathered together to opine on a single case.

VI. THE METHODOLOGY

The original three experts (Dr. Hammer, Dr. Olley, and Dr. Huntsman) simultaneously evaluated Petitioner Hill at the Mansfield Correctional Institution. Without Court interference, they divided the workload amongst themselves and conducted a variety of tests that will be discussed later. These experts demonstrated professionalism in their joint endeavors. In short, they worked well together.

Because the Ohio Supreme court in *Lott* invoked the PCR statute as the "suitable statutory framework for reviewing [an] *Atkins* claim," this Court looks to the statutory scheme in R.C. 2953.23, which mandates that the trial court **examine the entire record**, including transcripts of the underlying case, before it even considers whether there are substantive grounds for relief. R.C. 2953.23(C). And unless the files and record of the case demonstrate that a petitioner **is not** entitled to relief, the court shall proceed to a prompt hearing on the issues, even if a direct appeal is pending. *Id.* at subsection (E).

If the trial court is obligated to review the entire file before granting a hearing, *a fortiori*, the trial court is obliged to consider (and is entitled to consider) the facts and the evidence of the underlying case as part of the totality of the evidence on the issue of mental retardation. Nevertheless, this topic

is complex. The U.S. Supreme Court has rejected the so-called "nexus test." (See discussion, infra, footnote 12.) Specially, the High Court has rejected the theory that mental retardation must be apparent from the facts of the underlying crime—which is to say, that it must bear a nexus to the crime in order to be considered as a defense. This is a nullification test.

This court of common pleas, therefore, is required to reject the threshold test of "constitutional relevance" adopted by the U.S. Court of Appeals (5th Cir.) and overruled by the U.S. Supreme Court. That test places heavy emphasis on the facts of the underlying crime, requiring that a criminal's mental retardation be tied to the crime, in order to validate the defense of mental retardation. Otherwise the defense would have no traction, and would be nullified.[40] But, insofar as this Court is aware, the fact-finder in an *Atkins* hearing is, nevertheless, entitled to consider the underlying facts of the case. These facts are merely a part of the totality of the circumstances. These facts do not drive the determination of whether the Petitioner has met his burden of proof. Nor do the facts nullify probative testimony of **MR**.[41]

By invoking the PCR statute as the procedural guide in *Lott*, the Ohio Supreme Court has directed trial courts to consider "all files and records pertaining to the proceedings against the petitioner,

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[40] See *Tennard v. Dretke* (2004), 124 S.Ct. 2562. See, also, *Smith v. Texas* (2004) 125 S.Ct. 400.

[41] The term MR is meant to describe mental retardation in its tripartite forensic sense, as defined by AAMR and APA.

including *** the court reporter's transcript."[42] These records would naturally contain the facts of the case. The petitioner would be the first to cite facts in the trial record that indicate mental retardation. Common sense would dictate that the State would cite facts in evidence indicating the absence of mental retardation. Therefore, this Court finds that the facts of the underlying case are relevant and material, but only as part of the totality of circumstances, in determining whether the Petitioner has established his burden of proof on the second prong.

The methodology employed by this court, therefore, is one to be guided by the PCR statutory scheme in determining relevant evidence on the one hand, and to look to the Ohio Supreme Court, on the other hand, for its instruction that trial judges in *Atkins* cases must retain experts and rely upon their opinions in deciding **MR.** Nevertheless, "[t]he court "shall not be bound by the opinion testimony of expert witnesses or by test results, but may weigh and consider all evidence bearing on the issue of mental retardation." *In Re Hawthorn* (2005), 35 Cal. 4th 40, 50. Just the same, this court is not at liberty to treat capriciously the valuable, relevant and probative opinion testimony of the experts. So also, it may well be that the experts themselves have considered the totality of the evidence in arriving at their relative opinions.

The underlying facts of the crime may have only marginal value; but this fact-finder is admonished, in all events, to avoid application of the nexus test.

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[42] Ohio Rev. Code 2953.21.53(C).

VII. THE UNDERLYING CASE

A. The Crimes.

The facts of the crimes are set forth in considerable detail by the Ohio Court of Appeals and by the Ohio Supreme Court, in their consecutive decisions affirming the capital conviction of the Petitioner. The following facts are taken from the decision of the Ohio Supreme Court:

> "On September 10, 1985, at approximately 5:15 p.m., twelve-year old Raymond Fife left home on his bicycle to visit a friend, Billy Simmons. According to Billy, Raymond would usually get to Billy's residence by cutting through the wooded field with bicycle paths located behind the Valu-King store on Palmyra Road in Warren.
>
> ***
>
> "At approximately 5:50 p.m. on the date in question, Simmons called the Fife residence to find out where Raymond was. Simmons then rode his bicycle to the Fifes' house around 6:10 p.m. "When it was apparent that Raymond Fife's whereabouts were unknown, Simmons continued on to a Boy Scouts meeting, while members of the Fife family began searching for Raymond.
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> "At approximately 9:30 p.m., Mr. Fife found his son in the wooded field behind the Valu-King. Raymond was naked and appeared to have been severely beaten and burnt in the face. One of the medics on the scene testified that Raymond's groin was swollen and bruised, and that it appeared that his rectum

had been torn. Raymond's underwear was found tied around his neck and appeared to have been lit on fire.

"Raymond died in the hospital two days later. The coroner ruled Raymond's death a homicide. The cause of death was found to be cardiorespiratory arrest secondary to asphyxiation, subdural hematoma and multiple trauma. The coroner testified that the victim had been choked and had a hemorrhage in his brain, which normally occurs after trauma or injury to the brain. The coroner also testified that the victim sustained multiple burns, damage to his rectal-bladder area and bite marks on his penis. The doctor who performed the autopsy testified that the victim sustained numerous external injuries and abrasions, and had a ligature mark around his neck. The doctor also noticed profuse bleeding from the victim's rectal area, and testified that the victim had been impaled with an object that had been inserted through the anus, and penetrated through the rectum into the urinary bladder."

64 Ohio St.3d 313.

Several high school students offered eyewitness testimony, each from different vantage points, and at slightly different times, the totality of which was—

- to place young Raymond Fife riding his bicycle in the Valu-King parking lot, shortly after 5 pm, at the same time Danny Lee Hill and Timothy Combs were observed standing together in front of a nearby store;

- to hear a child's screams from a nearby woods at about 515 pm, and, at the same time to observe Timothy Combs alone walking toward the woods; and
- to observe Danny Lee Hill and Tim Combs walking together out of the woods between 530 pm and 6 pm – Combs at the time pulling up the zipper of his blue jeans, and Hill throwing a stick back into the woods.

Powerful forensic testimony was introduced:

- which connected a broken broom stick (recovered in the vicinity) to the size and shape of organ damage to the body of young Raymond, with splinters on the stick matching splinters in the anatomy of the victim; and
- which linked Danny Lee Hill's dental impressions to bite marks on the victim's penis.[43]

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[43] The bite marks on Raymond's penis were compared with dental impressions taken from both Petitioner Hill and his confederate Timothy Combs. Petitioner's impression demonstrated a distinctive fracture of tooth number 8. The State's forensic odontologist concluded to a reasonable degree of dental certainty that Petitioner Hill had inflicted the bite marks. (Trial Tr. p. 937-945). The defense's forensic odontologist testified Hill was a "likely" source of the bite marks. (Trial Tr. p. 1157-1158). Though no forensic evidence could be detected on Petitioner's clothing, his own brother testified that he saw Petitioner in the family's bathroom washing what appeared to be blood from a gray pair of trousers which Petitioner wore the day of the attack. (Trial T.p. 41-42). The Petitioner was observed washing his pants three days in a row.

Danny Lee Hill presented himself at the Warren Police Department on September 12, 1985, two days after the attack. He offered misleading information about Raymond's murder in effort to collect a $5,000 reward.[44] The Petitioner gave various statements to the authorities, in which he sought to implicate Combs and exculpate himself, but his denials were saturated with details known only to the authorities. In addition, the State offered evidence of other recent prior acts-two violent rapes against women in the relatively recent past, and an incident involving an effort to commit anal intercourse and felatio upon a cellmate in a juvenile detention facility.[45] In essence, then, circumstantial evidence, direct eyewitness evidence, forensic evidence, and Danny Lee Hill's own statements established beyond a reasonable doubt that he murdered young Raymond Fife.

B. Mental Health Issues in the Underlying Case

Independent of *Atkins,* mental health issues play out in different contexts, and at different stages of a trial. The trial of Danny Lee Hill was no exception. Especially is this apparent in capital jurisprudence, when the attention to detail and the level of scrutiny is high. In the first instance, mental health issues take the form of defenses of incompetence to stand trial and insanity at the time of the alleged offense. Whereas competency is to be resolved by the trial judge before commencement of the trial, insanity is a jury issue during the first phase—the guilt phase—of

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[44] Suppression hearing Tr. p. 382; Trial Tr. p. 218.

[45] See Evidence Rule 404(B) "Other crimes, wrongs, acts." This evidence will be revisited anecdotally as part of the history bearing application to prong 2 of the forensic definition of MR.

a capital trial. In capital cases, where the mitigation phase is bifurcated from the guilt phase of the trial, mental retardation has, for a long time prior to the date of the *Atkins* decision, been a topical defense in mitigation in two statutory respects—the first relating to mental disease or defect,[46] and the second relating to mental retardation.[47] Under the statutory catchall provision of: "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death."[48] These mitigation factors are considerations for the jury. The Ohio Court of Appeals has recently observed that "[t]here is a significant difference between expert testimony offered for mitigation purposes and expert testimony offered for *Atkins* purposes."[49] This distinction is important because Danny Lee Hill has been

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[46] R.C. 2929.04(B)(3).

[47] R.C. 2929.04(B)(7).

[48] Under the competency-to-stand-trial scheme, and "for purposes of a separate mental retardation evaluation," only a licensed clinical psychologist (and not a psychiatrist) is qualified as an expert. See definition of "examiner" R.C. 2945.37(A)(2)(a) and (b). And See R.C. 2945.371(H). This restriction would not apply during the mitigation phase of the jury trial (under the catchall provision of R.C. 2929.04(B)(7).

[49] *State v. Bays*, 2005 Ohio 47 (2d Dist.) at par. 23. In *State v. Lorraine* (May 20, 2005), 11th Dist. No. 2003-T-0159, the court held that mitigation evidence, because it was introduced without the benefit of the *Lott* and *Atkins* decisions, was insufficient to determine that Lorraine was *not* mentally retarded for *Atkins* purposes. Therefore, this Court must likewise find that mitigation evidence now twenty years old cannot be wholly dispositive of whether a defendant *is* mentally retarded. While it may be relevant, its probative value comprises only a part of the totality of the circumstances and evidence produced.

acknowledged by three courts—the Court of Common Pleas of Trumbull County, the Ohio Court of Appeals, and the Ohio Supreme Court—to be a mentally retarded person. But, here are some examples of the context in which "mental retardation" has been articulated—

• By the Court of Common Pleas: On Hill's motion to suppress statements, the trial court issued the following opinion:

> **"Though defendant is retarded, he is not so seriously impaired as to have been incapable of voluntarily and knowingly given statements which the defendant now seeks to suppress.** The Court reaction is conclusion after seeing and listening to the defendant at **the** Suppression Hearing and listening to and watching the tape recording and videotaped statements of the defendant. The Court concludes that the statements were made voluntarily, willingly, and knowingly."
>
> Excerpt of a judgment entry dated Jan. 17, 1986
>
> (Quoted in *State v. Hill*, 64 Ohio St 3d at 316

• By the Court of Appeals: First, on the suppression issue:

> **"Appellant, in the case at bar, admittedly suffers from some mental retardation (although the evidence presented is divergent as to the severity of the handicap) and has had concomitant difficulties in language comprehension throughout his formal education. Appellant is categorized as being mildly**

to moderately retarded. Evidence was presented which indicates that appellant is illiterate and this court acknowledges that literal recognition of each word contained in the "Miranda Rights" and/or "waiver form" may be beyond appellant's mental comprehensive capacity. (Emphasis in bold added.)

"*** The audio and video tapes of appellant's interrogations disclose that appellant was capable of understanding the questions put to him and of responding intelligently.

'Moreover, the behavior of the appellant during the police investigation belies the notion that he was no more than a malleable victim of police suggestion. **Appellant possessed the requisite intelligence to implicate other persons in the murder and was capable of modifying his story when inconsistencies were demonstrated to him. Additionally, appellant qualified and corrected the police officer's misstatements of the factual scenario which he had related to them. He also was able to follow "verbal concepting," displaying an understanding of the officers direction of questioning and the dialogue utilized during the interrogation."**

1989 Ohio App. LEXIS 4462, pp. 4-5.

Secondly, on the issue of Hill's waiver of his jury trial rights, in favor of a bench trial before a three-judge panel:

"There is no evidence in the record indicating that the trial court accepted the waiver without scrupulously ascertaining appellant's ability to understand the impact of his actions. Further, there is enough competent evidence to determine that the trial court's decision was not against the manifest weight of the evidence. **In so holding, this court does not express any opinion as to the ability of other mentally retarded persons to waive their constitutional rights.** Such a decision will have to be made on an individual case by case basis, considering all appropriate facts and the totality of the circumstances of each case. This court does, however, hold that sufficient evidence exists in this matter to determine that appellant effectively (knowingly, intelligently and voluntarily) waived these constitutional rights."

Id. at page 9.

Thirdly, on the issue of the mitigating phase of the trial:

"Generally, the [trial] court did consider **appellant's low mental age.**

"Appellant's mother during mitigation also testified that appellant had fallen off a swing and, on another occasion, had been hit by an automobile. **However, no express evidence was offered which indicated appellant's retardation was the result of the physical traumas.** To the contrary, evidence was offered which suggested that seventy-five percent of the time, the cause of the retardation is unknown. Furthermore, Dr.

> Crusin indicated that neither of the injury reports indicated brain damage. As such, there was no evidence before the court which it could consider during mitigation on this subject."
>
> *Id.* at page 18.

• By the Ohio Supreme Court: On the mitigation issue:

> "With respect to the enumerated mitigating factors set forth in R.C. 2929.04, **we find that defendant's mental retardation is a possible** mitigating factor. See *Penry v. Lynaugh* (1989), 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256. However, as the *Penry* court noted, there are various levels of mental retardation, and a person must be viewed individually as to the degree of retardation."
>
> 64 Ohio State 3d at 335

These judicial comments and conclusions regarding mental retardation are based upon the following testimony as gleaned from the trial record by the Ohio Supreme Court:

> "[W]e review the testimony in the record, and note first that defendant's mother, Vera Williams, testified that all of her children were "slow" and that defendant's father never lived with the family. In sum, defendant had a poor family environment.
>
> "Dr. Douglas Darnall, a psychologist, testified that defendant had an I.Q. of 55 and that his intelligence level according to testing fluctuates between mild retarded and borderline intellectual functioning, and that

he is of limited intellectual ability. Dr. Darnall did state, however, that defendant was able to intellectually understand right from wrong.

"Dr. Nancy Schmidtgoessling, a clinical psychologist, testified that defendant had a full scale I.Q. of 68, which is in the mild range of mental retardation, and that the defendant's mother was also mildly retarded. Dr. Schmidtgoessling also testified that defendant's moral development level was 'primitive,' a level at which 'one do[es] things based on whether you think you'll get caught or whether it feels good. [T]hat's essentially whereabout *[sic]* a 2-year old is.'

"Dr. Douglas Crush, another psychologist, testified that defendant had a fullscale I.Q. of 64, and that his upper level cortical functioning indicated very poor efficiency.

"Other mitigation testimony on behalf of defendant indicated that he was a follower and not a leader, who had to be placed in group homes-during his youth.

"Defendant also gave an unsworn statement to the trial court, in which he stated that he was sorry what happened, and that he didn't want to die. Defendant then started to cry."

State v. Hill (1992), 64 Ohio St. 3d 313, 334-335

Though not noted in the Ohio Supreme Court's opinion, Dr. Crush admitted on cross examination that Petitioner Hill may not have been cooperating fully, i.e., that he may have malingered during the

course of his neuropsychological testing. (Mitigation Tr. Page 324-325, Atkins Tr. Vol. IV, page 908).

C. Res Judicata Revisited

With the historical judicial pronouncement of Danny Lee Hill's mental capacity in mind, it will be helpful to revisit the res judicata issue. It cannot be denied that the mental health issues in the underlying case, as articulated by three different state courts, present a profile of a criminal defendant who is said to be mentally retarded. However, the prime rule of judicial decision-making is to interpret word and phrases *in context*. The role of the court is to discern the intent of judicial pronouncements—the words and phrases—in context according to the rules of grammar and common usage. In this respect, both the Ohio Supreme Court and the United States Supreme Court have made it clear that mental retardation is to be judged in context.

In *State v. Lott*, the seminal guide for Ohio judges on *Atkins* issues, the State argued that res judicata foreclosed the issue of MR as a defense, since it could have been raised in direct appeal, as opposed to collateral proceedings.[50] Our High Court rejected that argument, citing no less than three factors that place the issue in a different context. These factors are as follows:

•Lott lacked the opportunity to fully litigate his mental retardation claim;

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[50] R.C. 2953.21 et seq. And see *State v. Perry* (1967) 10 Ohio St.2d 175. For a discussion of res judicata and its separate components of "issue preclusion" and "claim preclusion" *see MetroHealth Medical Center v. Hoffmann LaRoche Inc.* (1997), 80 Ohio St.3d 212.

•although a convicted capital defendant could have raised mental retardation in a variety of different settings, such as for issues of competency, a variety of waiver issues, as well as sanity, and especially in mitigation, the development of the law—pre-*Atkins*—did not present MR as a complete constitutional bar; and

•most notably, Lott did not have *Atkins*'s guidance as to what constitutes mental retardation.[51]

But the very best evidence that res judicata does not apply in the context advanced by the Petitioner may be gleaned from the *Atkins* case itself. Daryl Renard Atkins's full-scale IQ score was 59. He was said to be a "slow learner." According to the forensic psychologist, Atkins would automatically qualify for Social Security disability income; he comprised less than one percentile of the population at large, and that he was diagnosed "mildly mentally retarded." This analysis was supported by a review of both school and court records as well as the administration of the Wechsler Adult Intelligence Scales test (WAIS III). Against this evidence, the Commonwealth of Virginia did not contest the IQ score, but produced an expert witness who

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[51] Finally, the Lott opinion is instructive on two additional points: first, in considering res judicata in context, the doctrine would not apply even if mental retardation had actually been litigated by Lott; and, second, by implication under the doctrine of mutuality, both the State and a capital defendant are entitled to the same fresh approach in litigating *Atkins* issues. In *State v. Lorraine* (May 20, 2005), 11th Dist. No. 2003-T-0159, the court there held that mitigation evidence, because it was introduced without the benefit of the *Lott* and *Atkins* decisions, was insufficient to resolve mental retardation issues for *Atkins* purposes.

administered a portion of a 1972 version of a Wechsler Memory scale, conducted two interviews of Atkins, himself, and interviewed correctional staff. The Commonwealth's expert concluded that Atkins's poor academic record was of his own choosing, that he possessed an anti-social personality, and that he was not mentally retarded. Faced with this divergence of opinion on the record below, here is what Justice John Paul Stevens had this to say:

> To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. **Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.** As was our approach in *Ford v. Wainwright*, with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." 477 U.S. 399,405, 416-417 (1986).
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> *Atkins v. Virginia*, 536 U.S. at 317

From these remarks, two messages are clear: one is explicit and the other is implicit. The explicit message is that the individual States are to be given deference in developing the procedures to enforce the constitutional mandate. The second message—an implicit one—is that mental retardation is to be judged in context. Unquestionably, the United States Supreme Court is serious about these two objectives,

for it has not hesitated to protect this deference by peremptory action. Consider *Schriro v. Smith* (October 17, 2005) _ U.S._, 2005 WL 2614879, a per curiam opinion, in which the Supreme Court reversed the 9th Circuit for exceeding its authority in Federal Habeas Corpus by ordering a jury trial on the issue of MR, without allowing the State of Arizona to establish its own procedures.[52] The Supreme Court, in its supervisory capacity over inferior federal courts, is requiring that state courts be accorded the first opportunity to consider each Atkins hearing on its merits.

This court concludes, then, that historical judicial pronouncements that Danny Lee Hill is a mentally retarded individual (accurate as they might be in limited context) are not at all determinative of his mental health in the context of the forensic definition

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[52] In a filing on November 30, Petitioner Hill's attorneys have submitted a Report and Recommendation by Chief Federal Magistrate Judge Michael R Merz, finding that although the Petitioner there has an unexhausted *Atkins* claim in Montgomery County Common Pleas Court, in fact a pending claim, he has an exhausted double jeopardy claim, for the reason that the trial court there denied his double jeopardy argument The Petitioner claims this court did the same by denying his double jeopardy argument in an entry on March 19, 2004. In fact, this court did no such thing. Nowhere in this court's 23-page entry of March 19, 2004 is the term "jeopardy" mentioned. The Chief Magistrate's Report refers to the case of *State v. Bies* (1996) 74 Ohio St. 3d 320. In that case, the Supreme Court of Ohio refers to Petitioner Bies as having mild to borderline mental retardation. Whether that comment is in context with MR as forensically defined is not for this court to consider. This court has used MR throughout this opinion to mean mental retardation as forensically defined by *Atkins* and *Lott*. On the other hand the Petitioner's most recent filing cites MR in a much different context.

of mental retardation. However, certain components of MR (the forensic definition) might be determined from historical pronouncements. The example that comes to mind relates to Prong I of the MR definition—viz., the full-scale IQ score of a capital defendant.

VIII. THE *ATKINS* ISSUES

A. The First Prong: Significantly Subaverage Intellectual Functioning

Significantly subaverage intellectual functioning is defined as an IQ of 70 or below.[53] All of the forensic MR definitions require an IQ of approximately two standard deviations below the mean.[54] Petitioner Hill's I.Q. scores have fluctuated over the years.

1. Pre-Atkins IQ History-Age 6 to Age 33

All three experts[55] reviewed available school records and numerous IQ tests results, including several administered while Petitioner Hill was enrolled in the Warren City School System, and one at age 33 while a prisoner on Death Row. The following chart represents a summary of the Petitioner's IQ scores leading up to April of 2004 when, in response to this court's order, Drs. Hammer, Olley and Huntsman journeyed to the Mansfield Correctional Institution for the purpose of

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[53] *Lott*, at ¶12, 17. See definition in AAMR (1992 and 2002); See, also APA's DSM-IV definition.

[54] The mean score of the WAIS-III is 100, and a single deviation is 15 points. Thus, a score of 70 constitutes two deviations below the mean.

[55] The three original experts assigned to this Atkins hearing were Drs. Hammer, Olley, and Huntsman.

assessing the Petitioner's current intellectual acumen.

CHRONOLOGICAL AGE	FULL SCALE IQ
6 YEARS and 2 MONTHS	70
8 YEARS and 8 MONTHS	62
13 YEARS and 4 MONTHS	48
13 YEARS and 5 MONTHS	49
15 YEARS and 3 MONTHS	63
17 YEARS OF AGE	55
18 YEARS OF AGE	68
18 YEARS OF AGE	64
33 YEARS OF AGE	71

Before discussing the events of this Death Row visitation, it will be helpful to analyze the above IQ scores in context with the available evidence.

At 6 and two months, a Warren City School psychologist first tested Hill. He scored a 70 on the Stanford-Binet, with a mental age of four and seven months. As a result, he was placed in special education, specifically, the Educably Mentally Retarded Class (EMR). (Atkins Tr. Vol. I, pp. 63-64).[56]

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[56] Yet, according to Dr. Hammer, a witness for the Petitioner, a score of 70 when this test was administered in 1973 should *not* have placed the test taker in the range of mental retardation. The standard deviation for this Stanford-Binet at that time was 16, not 15, and thus the cut-off for mental retardation was 68, calculated thusly: 100 minus (2X16)=78. (Atkins Tr. Vol. II, p. 346, Vol. V p. 762). However,

At eight years, eight months, Petitioner was re-tested and scored a 32. (Atkins Tr. Vol. IV, p. 893). At age thirteen years, four months, Petitioner scored 48 on the Wechsler Intelligence Scale for Children, placing him in the moderately mentally retarded range. (Atkins Tr. Vol. I, pp. 90-92). Evidently, only a month later (at age 13 and five months) the Petitioner was re-tested, registering a score of 49. (Atkins Tr. Vol. I, p. 146; and Petitioners Exhibit 18). Nearly two years later, Hill was tested yet again at age 15 and three months, demonstrating a full-scale score of 63. In connection with serious juvenile delinquencies, Hill was tested at the age of 17; and, with the Fife murder charges pending, he was tested twice, with scores of 68 and 64 respectively.[57] Thus, with a rich record of IQ testing between the ages of 6 and 33, the average full scale score is 61.12. Because Dr. Hammer discounts the reliability of the two high 40s test scores for Hill at age 13, elimination of these scores from the mix produces an average full scale score of 64.72. It is interesting to observe that the highest test scores that Danny Lee Hill was able to achieve are the bookend scores of 70 and 71—the first at age 6, an age of innocence, and the last at age

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these calculations may not include the Standard Error of Measurement factor, known as SEM.

[57] Dr. Nancy Schmidtgoessling administered a Wechsler Adult Intelligence Scale Revised (WAIS-R) on October 25, 1985, shortly after Hill's arrest for murder. The score: 68. The issue: Hill's "knowing," etc. waiver of his Miranda rights. Dr. Douglas Crush, a specialist in neuropsychology, was retained to administer a WAIS-R test in preparation for the mitigation phase of the murder trial. Here, the full scale score was 64. (Mit. Tr. Page 299).

33 on death row in the year 2000.[58] The purpose of the IQ test in 2000 is unclear, as is the identity of the party that ordered it. Mansfield Unit Manger Jennifer Risinger stated that she escorted Petitioner Hill to take an IQ test in 2000 upon orders from the Warden, but she (Risinger) had no idea why the test was administered.[59]

2. Court-Ordered Testing under the guidance of Atkins and Lott

Doctors Hammer, Olley, and Huntsman arrived at the Mansfield Correctional Institution in April of 2004 for a three-day session in order to assess Petitioner Hill's current intellectual functioning. The three doctors agreed that Petitioner Hill was "faking bad" when tested.[60]

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[58] (Atkins Tr. Vol. I, pg. 48).

[59] (Atkins Tr. Vol. V, pp. 1209-1216).

[60] See testimony of Dr. Hammer (Atkins Tr. Vol. I. pp. 130-133). The term 'faking bad' is a psychological term of art, of concern to clinicians and especially psycho-metricians (test designers). The term is easier to understand when compared with 'faking good.' Faking is defined as a "motivated attempt to manipulate the results of a psychological test". According to Glossary of Terms by Bruns and Disorbio (Excerpted from BHI 2 Manual, 2003), there are several types of faking: bad, good and double faking—faking bad on one part of a test (e.g., physical well-being), and faking good on the other (e.g., psychological well-being). For pure IQ tests, it would seem impossible to fake good; but there are many types of psychological tests other than IQ, such as forced-choice integrity testing for job applicants. And there are many situations in criminal jurisprudence in which psychological test taking and "faking bad" becomes relevant. See, for example *United States v. Curtis*, _F.3d_ (4th Cir. No. 02-4294 5-7-2003), involving the issue of psychological susceptibility to entrapment and "faking bad."

Petitioner scored a 58 on the Weschler Adult Intelligence Scale (WAIS-III) IQ test. (Atkins Tr. Vol. IV, p. 867). In order to confirm on their suspicions of malingering, Dr. Huntsman administered the Test of Mental Malingering (TOMM). As Dr. Huntsman testified, "[h]e performed so poorly that I think the only real conclusion would be that he was deliberately giving incorrect answers." (Atkins T. p. Vol. IV, p. 868).

3. Judicial Fact-Finding on Prong I: Significantly Subaverage Intellectual Functioning

In determining whether the 1st prong of *Atkins* has been proved by a preponderance of the evidence, this court observes that the test of significantly subaverage intellectual functioning is defined as an IQ of 70 or below. For reasons of coincidence, or otherwise, this Petitioner seems to be right on the borderline of 70. This court finds that the Petitioner has satisfied Prong I of the forensic definition of MR. Dr. Hammer has credibly and perceptively observed that Danny Lee Hill—

> keeps bumping up against this ceiling of IQ of 70, and then everything kind of falls below that. When he's got a bad period, either unmotivated or maybe in a lot of trouble legally, those scores tend to drop off a bit even to lower ranges, which is not unusual.
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> Atkins Tr. Vol. I. Pg. 106.
>
> And further,
>
> ... there's this ... consistent ... bumping against the ceiling of around the high 60s, 70s,

> something like that in terms of his maximal performance.

Id. Page 258.

Yet, at least in one instance the standard error of measurement (SEM) for one of the IQ tests placed the Petitioner above the Prong I cutoff score. In other instances, the SEM has not been analyzed; nor has the cultural bias factor been quantified, although all three experts acknowledged its existence. Dr. Hammer attributes the disparity in some of the scores to the subject's character flaws—"bad" periods of time when he is "unmotivated or maybe in a lot of trouble legally."[61]

However, Dr. Olley, the State's expert, had no difficulty finding that the Petitioner has satisfied Prong I of the diagnosis:

> Q. But it is your opinion, nonetheless, that he satisfied Prong I?
>
> A. Prior to the age of 18, yes.

The States suggests that the Petitioner's decision to "fake bad" his most recent IQ test—a court-ordered test in the context of an *Atkins* hearing—tarnishes the preponderance of the evidence on Prong I. But, while the Petitioner's decision to skew the test results tells us something about his state of mind, and perhaps his own belief that he is smarter and more intelligent than he would prefer this court to believe, the IQ scores over time are what they are.

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[61] Atkins T. Vol. I, Page 106.

The Petitioner satisfies Prong I by a preponderance of the evidence.[62]

B. The Second Prong: Significant Limitations in Two or More Adaptive Skills, Such as Communication, Self-Care and Self-Direction.

The second prong of the tripartite test defining mental retardation is "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction."[63] This prong was lifted from the 1992 AAMR definition of mental retardation. In 2002, the AAMR published an updated version of the second prong, by regrouping the various topics into three basic categories as follows:

I. Conceptual adaptive skills;

II. Social adaptive skills; and

III. Practical adaptive skills

According to AAMR, a significant deficit in any one of the above categories satisfies the prong for purposes of diagnosis. This change in the definition is said by the expert witnesses to be a distinction without a difference—a mere rearranging of the multiple concepts into three categories. This court is obliged to follow the forensic definition outlined by

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[62] Ohio Jury Instructions Section 3.50: Preponderance 1. DEFINITION. Preponderance of the evidence is the greater weight of the evidence; **that is, evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it.** A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed. Quality may, or may not, be identical with (quantity) (the greater number of witnesses). [Emphasis added in bold.]

[63] *Lott*, at par. 12.

the Ohio Supreme Court in *Lott*.[64] On the other hand, the legislature (in a different context) defines mental retardation as one "in accordance with standard measurements as recorded in **the most current revision** of the manual of terminology and classification in mental retardation published by the American [A]ssociation on [M]ental [R]etardation." R.C. Section 5123.01(Q). (Emphasis in bold added.)

But, whether one gleans the adaptive behavior model from the 1992 definition or the 2002 definition, the psychological specialists agree that adaptive behavior issues are capable of being measured in a psychometric manner—a manner similar to the administration of an IQ test. This is the object of the Vineland Social Maturity Scale as well as the more modern SIB-R (the Scales of Independent Behavior), in which the mean score, typically like an IQ test, is scaled mathematically and statistically so that 100 represents the mean score for adaptive skills of the population at large.

This court's understanding is that a score separating mild retardation from "borderline"[65] is not

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[64] Specifically, the APA's 1992 definition lists the following skill areas: communication; self-care; home living; social/ interpersonal skills; use of community sources; self-direction; functional academic skills; work; leisure; health; and safety. (DSM-IV at pg. 39).

[65] "Borderline" is a term of art denoting a full-scale score between the 1st and the 2d standard deviation. As outlined earlier in this opinion, one deviation represents 15 points. (Atkins Tr. Vol. I, pg. 106, in which the interrogator mentioned 84, when it should have been 85). Therefore, a "borderline" score would be a score between 85 and 71. Two standard deviations below the norm of 100 equal 70. Thus the range for Mild MR is between 70 and 56. Three standard deviations

wholly controlling—up or down—on the ultimate diagnosis. Here are some examples supporting that proposition. The first is gleaned from the *Lott* decision itself, in which the Ohio Supreme Court observed that a Prong I full-scale IQ score of above 70 presents a "rebuttable presumption" that a defendant is not mentally retarded.

> While IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue. *Murphy v. State*, 54 P.3d at 568, 2002 OK CR 32, at ¶29. We hold that there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70.

Lott at 305.

Theoretically, then, the experts, for example, could judge a defendant with a score of 75, as mentally retarded, although one might observe that a legal presumption that one is not mentally retarded—though a rebuttable one—is not easily overcome.[66]

("Moderate" MR) produce a range between 55 and 41, and so forth down to "Severe" MR (four deviations) and finally "Profound" MR (five deviations).

[66] In order to overcome a rebuttable presumption, the party must, in the first instance, dispel the presumption by equal weight, bringing the issue to equipoise; then, the party who has the burden of proof must produce sufficient evidence to preponderate in favor of the proposition. "[W]here a rebuttable presumption exists, a party challenging the presumed fact must produce evidence of a nature that counterbalances the presumption or leaves the case in equipoise. Only upon the production of sufficient rebutting evidence does the

A second example for the proposition that an IQ score alone is not dispositive of the diagnosis is contained in the APA manual itself.[67]

A third example—a more practical one—is gleaned from a constellation of cases, post Atkins, in which a sub-70 full-scale IQ score, unaccompanied by significant Prong II deficits failed to achieve the MR diagnosis.[68] Thus, it is well recognized by the experts that "a diagnosis of mental retardation requires more than a low I.Q. score. Mental retardation—

> "is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence."

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presumption disappear." [Citing authority.] See *Cleveland Mun. School Dist. Bd. of Ed. v. Cuyahoga Cty. Bd. Of Revision*, 107 Ohio St. 3d 250 at 253, 2005 Ohio 6434. Especially see *State v. Stallings*, 2004-Ohio-4571 (9th Dist.), overcoming rebuttable presumptions as to 1st and 2d prong, but not the 3d.

[67] See DSM-N-TR, 4th ed. pp.41-42, discussing IQs between 70 and 75, when accompanied by significant deficits in adaptive behavior, thus warranting an MR diagnosis even though the subject has scored above 70.

[68] The first example is Atkins himself, a defendant with an IQ of 59, who failed to prove MR by a preponderance of the evidence. See footnote 2, infra. See also *Ex parte Rodriguez*, _S.W.3d_, 2005 WL 1398132 (Tx. Ct. Cr. Appeals), with IQ scores of 60 and 68. There are numerous cases scattered throughout the country that emphasize the need to go beyond IQ scores in order to resolve *Atkins* diagnostic issues. E.g., *In Re Hawthorne* (2005), 35 Cal.4th 40, 49. *In re. Holladay* (11th Cir. 2003), 331 F.3d 1169, 1175 n.3. And see *State v. White*, 2005-Ohio-6990 (12-30-05 C.A.9).

In Re Hawthorne (2005), 35 Cal.4th 40, 49.

Test scores for both intelligence and adaptive behavior are within the domain of the experts. So also are the nuts and bolts of devising and administering an IQ test (for example a WAIS-III test)[69] as well as an adaptive behavior test (for example a SIB-R test). This is a way of saying that expert testimony is appropriate and necessary to assist the fact-finder. Thus, the Ohio Supreme Court, has observed:

> The trial court should rely on professional evaluations of [a petitioner's] mental status, and consider expert testimony, appointing experts if necessary, in deciding this matter.

Lott, at par. 18

This court is obligated to rely upon the professional evaluations of the Petitioner's mental status. And to the extent that the Petitioner intentionally corrupted the testing process itself, this court is entitled to consider that default as part of the totality of the evidence.

The Petitioner's decision to tarnish the testing process was not limited to the IQ test. It certainly would seem to have been in his better interests to cooperate with his own expert as to Prong II, but his lack of cooperation rendered impossible the task of the three psychologists in conducting an adaptive behavior assessment—a Prong II psychometric analysis. (Atkins Tr. Vol. II., page 294.) That lack of cooperation, in the view of this court, is critical,

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[69] Meaning Wechsler Adult Intelligence Scales test, 3d edition.

because Dr. Hammer believed there was a paucity of evidence during the pre-age 18 period—this in spite of the seeming wealth of records and the sheer number of IQ tests relative to Prong I. And Dr. Hammer was not alone in commenting upon the dearth of available evidence as to Prong II. Both Dr. Olley and Dr. Huntsman would have preferred more evidence to evaluate Prong II. According to Dr. Olley: "more [information] is better" when it comes to judging adaptive behavior—this, as opposed to an IQ test, where a score is a score. (Atkins Tr. Vol. II, pg. 513). And here is what Dr. Huntsman had to say—

> "[t]here was clear evidence of malingering on the SSSQ [Street Skills Survival Questionnaire] and as far as I'm concerned on the ABAS [Adaptive Behavior Assessment System]. And on both of these tests, Mr. Hill systematically denied being able to engage in behaviors that collateral information or subsequent interviews revealed that he could do, perform quite nicely."[70]
>
> (Atkins T.p., Vol. IV, p. 901-902).

Given Danny Lee Hill's decision to sabotage the testing procedures, his attorneys were left with Vineland testing scores from his school days, together with selective anecdotal evidence of isolated conduct reports. This evidence is a thin reed.

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[70] Dr. Huntsman also administered the TOMM (the Test of Memory Malingering) and concluded "the results of that test clearly indicate to me that he was malingering." Atkins Tr. Vol. IV, pg. 864.

1. Vineland Social Maturity Scale— a Psychometric Test

The Vineland test was first published in 1935, by Dr. Edgar Doll, who named the test after the City of the same name in New Jersey. During the 1970s and 1980s, the Warren City Schools relied upon the Vineland Social Maturity Scale (Vineland I) to measure adaptive behavior. Four Vineland scores for the Petitioner were discovered among his school records. **These scores do not support a diagnosis of MR.**

The test was originally crafted as a barometer for judging the extent to which persons otherwise considered mentally retarded, and institutionalized, would be able to function in a socially responsible and independent manner; viz., outside of the institution. The Vineland reports two types of scores: "a social age" (also known as "age-equivalent") and a "social quotient," an SQ, achieved by the mean factor of social/adaptive skills, just as its companion IQ score of 100 would represent the mean factor of intelligence. Once the test is factored to 100, the psychologists are able to diagnose MR as two standard deviations below the mean. (Atkins Tr., Vol. III, pg. 560). It may be helpful to discuss the Q as in IQ or SQ. The Q, or quotient is "the numerical ratio, usually multiplied by 100, between a test score and a standard value."[71] An IQ score is achieved by dividing a person's mental age of 7, his IQ would be 7/10 X 100=70. If the same test-taker were to demonstrate a mental age of ten, his IQ would by 10/10 X 100=100. Ideally, he would represent the

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[71] Merriam-Webster's Collegiate Dictionary, 11th ed.

mean score in society—a score midway between the extremes. However, as one might suspect, the score resolution is not quite that simple. It is enough to say that resolution is beyond the ken of the non-professional—in fact, beyond the ken of this fact-finder. The raw scores in modern psychology are passed through complicated adjustment formulae and logarithms, in order that the mean of 100 can be achieved in society at large. For the fact-finder, reliance upon expert testimony is essential. However, the fact-finder's role is still to judge the ultimate reliability of the expert testimony, including the accuracy of the raw data—to the extent that the data is within the knowledge of the fact-finder.[72] This entire discussion regarding IQ has similar application to SQ.

	CHRONOLOGICAL AGE	SOCIAL AGE	SQ (SOCIAL QUOTIENT)
(1)	13	14	107 (calculated **now** by Dr. Olley)
(2)	15 and 3 mos.	12 and 0 mos.	78.6 (calculated **now** by Dr. Olley)
(3)	17 and 0 mos.	(Not reported)	82.9 (Reported **then** by Dr. Darnall)
(4)	17 and 4 mos.	12 and 6 mos.	72.4 (calculated **now** by Dr. Olley)

According to Dr. Olley, **only one** of Petitioner's Vineland scores included an SQ calculation. The three other scores registered **only social ages** (or age equivalent). Dr. Olley calculated the other three SQ scores by placing the social age as the numerator

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[72] See Ohio Jury Instructions (OJI) standard instruction on expert testimony.

and the chronological age as the denominator, and then multiplying times 100. But Dr. Olley, himself was quick to observe that this approach offered only an approximation. The approach failed to account for a logarithmic factor, scaled to a deviation score; and, not having access to that factor, Dr. Olley relied on fundamental math to arrive at an *approximate* score. Although incisive cross examination by Public Defender Meyers cast doubt in Dr. Olley's own mind as to the efficacy of the approach, Dr. Olley's analysis was useful in at least two important respects. First, he explained that his simplified mathematical approach is exactly the method utilized during the psychology's early years of psychometric analysis; and, secondly, with sophisticated computer-assisted mathematical adjustments as part of the current scoring process, it is just not reliable to pursue an approach out of synch with the formula in vogue at the time of the test. The best example of the difficulty of achieving reliability by tinkering with the ingredients that comprise the formula for a modem score is exemplified by the efforts of Dr. Sparrow.

This leaves for discussion the SQ score of 82.9 registered by Dr. Darnall when the Petitioner was age 17. Dr. Darnall's calculations, which he obviously scaled to a mathematical factor (the formula not noted on the records), produced a full-scale score well above the 70 cutoff score for MR.[73] Dr. Darnall,

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[73] It seems that many of these psychology tests are proprietary, thus explaining the absence of manuals and charts for particular time periods. On the other hand the Petitioner, for himself: as opposed to his counsel, argued that these records were intentionally concealed. None of the experts expressed any amazement over the absence of manuals and charts in the

himself at the time, believed the score was an overestimate of Danny Lee Hill's adaptive skills, given that the informant was his mother.[74] How much of an overestimate we do not know. And while this court is not prepared to consider that score as reliable proof of anything—up or down—that score in the low 80s is not at all inconsistent with the rich record of anecdotal evidence bearing upon the Petitioner's social and communication skills.

2. Vineland Revised and Re-visited—the Sparrow Project

Dr. Sara Sparrow, a Connecticut psychologist and a distinguished scholar, revised Vineland I in 1984, when the Petitioner was 17. She re-named it the Vineland Adaptive Behavior Scales (Vineland II). Dr Sparrow has retained to recalculate the Vineland I scores, which the Petitioner registered in the early to mid-1980s. The State conceded that Dr. Sparrow was a qualified expert, but the State eventually moved to strike her testimony as non-compliant with the Daubert Principle.[75] This court, sitting as trier of

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school records. Nor is there any evidence of concealment. But the Petitioner's concern about this demonstrates the extent to which he is capable of attention to detail.

[74] Atkins Tr., Vol. III, pg. 565.

[75] In 1993, the United States Supreme Court issued its opinion in *Daubert v. Merrell Dow Pharmaceutials, Inc.* 509 U.S. 579. In its decision, the High Court established gate-keeping principles for trial judges faced with the issue of whether expert testimony offered in evidence is scientifically sound. As the gatekeeper, the trial judge must decide if the fact-finder is to hear the evidence. Evidence that is not scientifically unsound and unreliable is to be suppressed. The *Daubert* case (pronounced Dow-bear) enunciated a principle binding on inferior federal courts under the Supreme Court's supervisory

fact, elected to hear the testimony, but reserved ruling upon the issue. For reasons that follow, this court has concluded that the rate of error of Dr. Sparrow's conclusions on the limited issue of re-casting the Petitioner's old scores in a fresh light is so high as to render her testimony inadmissible under the Daubert principle. As a secondary proposition (in the event a higher court find this court's ruling to be in error), this court, as the fact-finder, rejects her opinion in favor of the opinion of Dr. Hancock.

Dr. Hancock testified that Dr. Sparrow's analysis and conclusions were unreliable and unscientific. Essentially, Dr. Sparrow revised the scores on two of the old tests, arriving at full-scale SQ scores below the 70 cut-off mark. She did this by a complicated back-to-the-future process. Yet, she admitted under cross-examination by Mr. Watkins that her re-scoring method is "not a common practice," not done for IQ tests.

Dr. Sparrow's general re-scoring methods and formulae were crafted during the period of time that the two Vinelands (I and II) were in transition. A linkage study was done at that **time**, which she **then** reported to be .55. (Atkins Rebuttal, Vol. VI, pg. 227). To her knowledge, this is the first time the "linkage" theory has been presented in court. (Id at 232.) (Dr. Sparrow had not previously testified as an expert witness. She is not a psychometrics expert and could not render opinions concerning either the rate of

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power. But state court jurisdictions have adopted Daubert, including the Ohio Supreme Court in *Miller v. Bike Athletic* Co. (1998), 80 Ohio St.3d 607. And this court will be guided by the principles enunciated in the *Miller* decision.

error in her re-testing method or the statistical accuracy of her opinion. (Id at 170).

The State's surrebuttal witness, Dr. Timothy Hancock, reviewed the materials offered by Dr. Sparrow. He testified that where two different tests are equated (or "concorded") the strength of the relationship or "correlation" between the two tests should be that of r = .866 at **minimum in order to provide a 50%** certainty that the right true score will be predicted from one test to the other, (See 1st and 2nd paragraph of p. 240 Sparrow). The Sparrow materials correlation figure of .55 **approximates only 27% certainty, which means there is only a one in four chance that a re-score will be correct.** (Atkins Rebuttal T.p. 338-345) Asked to refute Dr. Hancock's conclusions, Dr. Sparrow stated a statistician would be needed for such testimony. (Atkins Rebuttal T.p. 170). As Dr. Hancock opined, a .55 correlation "doesn't provide enough predictive validity, enough predicted power for it to be reliable." (Atkins Rebuttal Vol. 6, pg. 337.)

3. The Daubert Analysis.

In determining the admissibility of scientific evidence, the Supreme Court of Ohio in *Miller v. Bike Athletic Co.* (1998, 80 Ohio St. 3d 607, established the trial judge as the gatekeeper. The *Miller* court went on to state—

> "[i]n evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subject to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance."

Id. at 611, citing *Daubert* at 593-594.[76]

See also the Ohio Rules of Evidence:

RULE 702. Testimony by Experts

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

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[76] See *State v. Hamilton*, 2002 WL 549841 (Ohio App. 11 Dist), and *Jones v. Conrad*, 2001 WL 1001083 (Ohio App. 12 Dist).

The staff notes to Rule 702 (July 1, 1994 Amendment) include the following observations:

> As to the reliability requirement, the Ohio cases have not adopted a definitive test of the showing required for expert testimony generally. The Ohio cases have, however, clearly rejected the standard of *Frye v. United States* (D.C. Cir. 1923), 293 F. 1013, under which scientific opinions are admissible only if the theory or test in question enjoys "general acceptance" within a relevant scientific community. See *Williams*, supra, 4 Ohio St. 3d at 58; *Pierce*, supra, 64 Ohio St. 3d at 496. See also *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993, __ U.S. __, 113 S. Ct. 2786 (similarly rejecting Frye and describing the reliability standard to be employed under the federal counterpart to Evid. R. 702.)
>
> Under Ohio law it is also clear that reliability is properly determined only by reference to the principles and methods employed by the expert witness, without regard to whether the court regards the witness's conclusions themselves as persuasive or correct. See *Pierce*, supra, 64 Ohio St. 3d at 498 (emphasizing that unreliability could not be shown by differences in the conclusions of experts, without evidence that the procedures employed were "somehow deficient"). See also *Daubert*, supra, 113 S.Ct. at 2797 (the focus "must be solely on principles and methodology, not on the conclusions they generate").

And in *Jones* v. *Conrad*, 2001 WL 1001083 (Ohio App. 12 Dist.), the Court of Appeals upheld the trial

judge's decision to exclude expert testimony because of its unreliability. The Court citing three cases—*Daubert*, *Miller*, and *State v. Nemeth* (1998), 82 Ohio St. 3d 202, 210-211—offered this observation:

> Our analysis focuses on Ohio law regarding admissibility of evidence under *Evid. R. 702.* *** [T]he drafters of the revised rule left Ohio's standard of reliability to be further developed by case law. Although the Ohio Supreme Court has only addressed this issue in two cases, it is clear that pursuant to the court's decisions in *Miller* and *Nemeth*, this inquiry involves consideration of the *Daubert* factors. Although appellant argues that Ohio's standard is much lower than the federal standard, the Ohio Supreme Court has determined that at least some indicia of reliability is required before admitting expert testimony.

The issue in this case is not so much the two Vinelands are efficacious in themselves as testing instruments. (Nor does this court question the skill with which Dr. Sparrow—a distinguished academician—revised the original Vineland). The issue is whether it is reliable to re-score test results that are 20 years old, so as to downgrade the SQ score into the MR category. Dr. Sparrow's correlation coefficient stands at .55, meaning that her error rate equals 75%. Dr. Hancock testified that he is unaware of any studies that even discuss the linkage between the two tests as Dr. Sparrow proposed. (Atkins Rebuttal Tr. Vol. VI, pg. 368). To discard Dr. Sparrow's opinion only because it lacks general acceptance would be inappropriate. But here the

undisputed evidence is that linkage-accuracy is substantially below 50% to a mathematical probability—thus well below proof by a preponderance of the evidence. Well below probability.[77]

4. Anecdotal Evidence and Prong II.

*"Functional academic **skills,**" "communication," "social/interpersonal skills"* and *"self-direction,"* these and more, comprise the list of adaptive skills identified by AAMR in its forensic definition of mental retardation.[78] This court has reviewed the evidence, in the context of the second prong, in three time frames: the Petitioner's early years; the Petitioner at 17 to 18, and, finally the Petitioner as a prisoner on death row. The court has also sought to rely upon the opinions of the experts, realizing, nevertheless, that the burden of the decision falls ultimately upon the trier of fact and not the expert.[79]

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[77] It should be noted that none of the original three experts were particularly impressed by the Vineland as an accurate reflection of *anyone's* adaptive functioning. Dr. Hammer testified that the SIB-R (Scales of Independent Behavior, Revised) is preferred in modern psychology over the Vineland. (Atkins Tr. Vol. II, pg. 434). Dr. Huntsman stated the Vineland was a **"bad instrument"** and [was] "ill-regarded [sic] and was*****not a very reliable measure for anybody.**" (Atkins Vol. IV, p. 944, 948). Dr. Olley testified it was **"not a very good test."** (Atkins Rebuttal Tr. Vol. VI. pg. 392. (Emphasis in bold.)

[78] The APA's 1992 definition lists the following skill areas: communication; self-care; home living; social/interpersonal skills; use of community resources; self-direction; functional academic skills; work; leisure; health; and safety. (DSM-IV at pg. 39).

[79] See *Ex parte Jose Garcia Briseno,* 2004 WL 244826 (Tex. Crim. App). 135 S.W.3d 1, 8:

Danny Lee Hill's adaptive skills are inconsistent with a mentally retarded individual.

a) The Petitioner's Early Years.

Records for the Petitioner's early years in the public school system demonstrate a combination of both academic deficiencies and behavioral problems. There is a reference to a head injury "in an accident at a young age." (Respondent's Submission of Documents, Vol. VI, pg. 708.) However, this possibility was explored extensively with Dr. Hammer, who fairly well discounted this issue. Furthermore, the test results, over the years, belie any pattern attributable to organic brain

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"The adaptive behavior criteria are exceedingly subjective, and undoubtedly experts will be found to offer opinions on both sides of the issue in most cases.

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"Although experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation, **the ultimate issue of whether this person is, in fact, mentally retarded for purposes or the Eighth Amendment ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations or credibility."** [Emphasis in bold added.]

See *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (U.S. Kan. 2002) (noting that "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law"); *Williams*, 831 So.2d at 859. In determining an *Atkins* claim, "the trial court must not rely so extensively upon this expert testimony as to commit the ultimate decision of mental retardation to the experts."

dysfunction. And, finally, the profile of the Petitioner today, as will be seen, demonstrates what can only be viewed as a capacity for self-improvement—the subject of special commentary by Dr. Olley as well as Dr. Hancock.

Records for the early years indicate that the Petitioner was disruptive and immature in class. There are references to 'Danny being easily led.' But beyond that blanket statement, the specific anecdotes paint a different picture—that of Danny Lee Hill as a leader of one—a loner—and not a follower. Especially is this apparent when it comes to serious misconduct. According to a bus driver's written report dated 1-27-81, the Petitioner, at age 14, **by himself,** began to punch another student—a girl, and he had to be restrained by the driver from following her off the bus. (Id. Vol. VI. pg. 743.) On 2-10-82, about a year later, the Petitioner **(alone)** was caught, stealing.[80] Numerous juvenile delinquencies are contained in the records. None support the proposition that the Petitioner, either as a boy or a young man, was easily led. As the Petitioner turned 17, a cavalcade of crimes played out—one more violent than the other, but once again this Petitioner was not working with confederates, was not charged with gang activity, was not a

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[80] About $77 had been stolen before a trap had been set. Only the Petitioner was identified as the thief. When interviewed, he was carrying a paring knife in his jacket. As a result, he was removed from the basketball team until he made restitution in the amount of some $100. He was quick to blame an innocent classmate for some of the crimes. (Respondent's Submission etc., Vol. VI. pg. 746-751.)

surrogate for another.[81] The totality of the anecdotal evidence for the early to mid-adolescent years of the Petitioner portrays a healthy boy described frequently by his teachers as lazy, who admits to experimenting with drugs and alcohol, who assaults the defenseless, steals frequently and lies a lot. Although his academic performance has been consistently poor, he is able to write in cursive, but prefers to print. In fact, his printing is neat and legible. (Id. Vol. VI. at 733)

Hill attacked Raymond Fife on September 10, 1985. Here is what Mrs. Kesco, a teacher at Fairhaven, had to say about him, some four years before the murder, in a memo dated October 2, 1981

> "Danny is a **bright, perceptive boy with high reasoning ability.** But his defiant attitude and refusal to obey any known authority hinders his learning. He is lazy, often verbally abusive, intimidating to other students and will bribe or steal for his own benefit." (Emphasis in Bold.)
>
> (Atkins Tr., Vol. II, pg. 398.)

b) The Petitioner at 17 to 18, including the Murder and the Trial

Three anecdotal events in 1984 are relevant to the issue of the Petitioner's self direction:

> 1. In March of 1984, some eighteen months before the murder of Raymond Fife, the Petitioner, acting alone, repeatedly raped a young mother, after breaking into her home.

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[81] Prior to this 18th birthday, Hill was arrested some 15 to 20 times. (Mitigation Tr. Pg. 185.)

> He bit her on the back and the breast, threatened to cut her vaginally and rectally, and threatened to rape and cut her baby. The victim escaped while Danny Lee Hill was putting on his pants. He, in turn, fled to the field behind Valu-King.
>
> 2. In the Morning of February 8, 1984, he raped a woman at knifepoint on a path leading from Valu-King. And—
>
> 3. While confined in a cell, during the winter of 1984, he attempted, unsuccessfully, to initiate sexual conduct with his cellmate.[82]

The above is not the profile of a docile or tractable individual. Furthermore, the AAMR, an authority upon which *all* experts rely, has this to say about *adaptive behavior versus problem behavior*:

- "Adaptive behavior is conceptually different from maladaptive or problem behavior."
- "The presence of clinically significant levels of problem behavior found on adaptive behavior scales **does not meet the criterion of significant limitations in adaptive functioning.**" (Emphasis in bold.)
- "Behaviors that interfere with a person's daily activities, or with the activities of those around him or her, are problem behavior rather than the absence of adaptive behavior."

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[82] See Supreme Court opinion affirming the judgment in *State v. Hill* (1992), 63 Ohio St. 3d 313 at 321.

Source: AAMR, Mental Retardation Definition, Classification and Systems Support 2, (10th Ed, 2002) p. 79.

Having committed the murder of Raymond Fife, Danny Lee Hill demonstrated self-direction by presenting himself at the station house in search of a reward. He also must have known that he was a suspect, a fact he was to verify in taped interviews years later by Tribune Chronicle reporter Andrew Gray His appearance at the police station was a desperate effort to misdirect the investigation. The police interrogation tapes demonstrate abundantly that Danny Lee Hill was able to hold his own with his adversaries. Dr. Olley had this to say on the topic of Hill's interrogation by the police:

> "***Mr.** Hill in my observation during that statement was not easily influenced. In **fact, be stood his ground during that interrogation very, very strongly.** When the detectives and police officers suggested, didn't you do this, and did you do that, he said absolutely no. **He only modified his story a little bit when he was faced with evidence that he couldn't possibly have avoided.** And then he, I thought rather, made a good effort to take that information, revise his story in a way that made it congruent. **That to me is a kind of thinking and planning and integrating complex information that is a higher level than I have seen people with mental retardation able to do."** (Emphasis in bold.) (Atkins Tr. Vol. ID p.5 (Atkins Tr. Vol. Ill, p. 586).

The totality of the evidence surrounding the interrogation, arrest, trial and conviction of Danny Lee Hill, presents a profile of a defendant with at least average communication skills, seldom, if ever, speaking out of context, and displaying abilities well above those described in his school records. Some examples:

- Said by his teachers to be unable properly to state his name and address, the defendant gave his full name and address to the police officers. The information included his apartment number.
- The defendant demonstrated accurate recollection of the time of day of various events, as well as accurate reference points in terms of months.
- The defendant demonstrated accurate attention to detail, particularly with respect to unspeakable events surrounding the attack upon young Raymond—details not known to the general public that he blamed upon his confederate Tim Combs.
- The defendant did not capitulate under the stress of interrogation.[83]
- The defendant was able to interact with his interrogators.[84]

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[83] This is significant because Justice Stevens, for the *Atkins* court, stated "mentally retarded defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit". *Atkins,* supra, at 305.

c) The Petitioner as a Prisoner on Death Row.

Danny Lee Hill has been on death row for twenty years. Convicted at the age of 19, he is now 39 years of age. **MR** (meaning mental retardation in its forensic sense) contemplates a relatively static condition of both low IQ and low SQ, which, together, manifest themselves before the age of 18.[85] In fact, the Petitioner has demonstrated maturity inconsistent with a mentally retarded individual. Consider the following categories: vocabulary; legal nomenclature; context; reading ability; ability to adjust to changing circumstances; use of community resources; physical appearance and apparent personal hygiene.

There are four sources of evidence are available from which this court is able to evaluate the social/adaptive skills of the Petitioner as a prisoner

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[84] According to Dr. Huntsman the mentally retarded are easily led or become quiet and passive. To the contrary, Petitioner Hill was interactive with his interrogators and corrected them at various points in the interview. (Atkins Tr. Vol. IV, pg. 891). "So the conclusion that I would probably—that I would draw from that would be that with a reasonable psychological certainty he was probably not retarded at the time of the offense." (Atkins Tr. Vol. IV, p. 908).

[85] The Petitioner's attorneys have generated considerable debate over the time frame within which mental retardation is to be judged. This court has ruled in pre-hearing motion practice (discussed in detail, infra) that the time frame for evaluating MR is the present, coupled of course with the proviso that manifestation must exist before the age of 18. This court, however, is prepared to make rulings in all three time frames, inasmuch as the experts themselves opined in all three time frames.

on Death Row. They are, first, the audio-taped interviews of the Petitioner by Tribune Chronical reporter Andrew Gray—particularly the 2d interview on July 13, 2000 lasting just under an hour; secondly, the conduct of the Petitioner in open court on many occasions, and his reaction to events changing circumstances; thirdly, the testimony of prison officials familiar with the day-to-day conduct of the prisoner; and, finally, the opinion testimony of the expert witnesses.

(i) The Andrew Gray Interviews

Two years before the United States Supreme Court handed down its landmark decision in *Atkins v. Virginia*, Danny Hill, *on his own initiative*, contacted his hometown newspaper, the Tribune Chronicle of Warren, Ohio, in an effort to generate publicity for his plight on death row. The Tribune assigned Andrew Gray to travel to the Mansfield Correctional Institution and to meet with Hill. Two sessions transpired, the first in May and the second in July of 2000 (Atkins Tr. Vol. IV, p. 1138). Assistant County Prosecutor LuWayne Annos interrogated Gray for the purpose of demonstrating that Danny Lee Hill's comprehension was superior to that of a mentally retarded person.

When Gray disclosed that the interviews had been taped with the Petitioner's permission, Petitioner's counsel demanded the tapes be produced. In fact, went so far as to ask this Court to hold Mr. Gray in contempt if he did not produce the tapes. (Atkins Tr. Vol. IV, pg. 1158). The tapes were

surrendered the next day. (Atkins Tr. Vol. V, pp. 1169-1172).[86]

This court has reviewed the tape of the second interview in detail. From that review

- General Vocabulary: The Petitioner's word power seems inconsistent with a mentally retarded person. Admittedly, his grammar is very poor, noticeably with respect to pronouns and antecedents; also indulging in phrases such as "I had went ... ," or " ..... what he had did ... ." But in an interview lasting nearly an hour, in which he did most of the talking, he was rarely at a loss for words; he never resorted to 'four-letter' words. Occasionally, he spoke metaphorically and colorfully, as in: "[County Prosecutor] Dennis Watkins "was just grabbing at air [during the trial];" or the "games being played by lawyers ... they tell you what you want to hear;" or a reference to the "political pass cards" of prosecutors and judges, "who use you to get bumped up" meaning elevated to a higher position; and also that "Dennis Watkins and Nonna [meaning Miriam] Fife force-fed the community" with bad publicity. He

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[86] Mr. Frank Robinson, Editor of the Tribune Chronicle, personally appeared voluntarily and delivered the tapes to the court. He stated there was a gentleman's agreement between the defendant and the reporter that if the defendant ever wanted a copy of the tapes they would be made available. The parties agreed that the tapes would be delivered to the State and arrangements made to copy and deliver to Petitioner's attorneys and to the court.

speaks about the "news media" and "manipulative games." Seeking to turn the full blame on the Fife murder upon his confederate, Hill informs the reporter that Tim Combs "had a history" of raping boys.

- Legal Nomenclature: Here, the petitioner's knowledge is remarkable. The following terms are a permanent part of his vocabulary, meaning they are expressed with ease, and in context and with correct emphasis: "transcript," "the new technology" (referring to DNA), "circumstantial evidence," "evidentiary hearing," "dental impressions," "rape kit," "post conviction" (referring, in context, to post conviction relief procedure and federal habeas corpus, as opposed to direct appeal), "the federal constitution," "pro death penalty" (referring to the prosecutor), "bogus issues," as in "don't waste the judge's time;" also "Eleventh District Court of Appeals" and "the Sixth Circuit," (demonstrating knowledge of our different judicial systems). Although the term "certiorari" may not be part of his vocabulary, he is well aware of the U.S. Supreme Court's discretionary power to grant or deny the issuance of the writ of certiorari. He is well aware of the Sixth Circuit's role as a court of last resort. He knows where courts are located geographically. He knows that when he gets into the federal system, the State Attorney General represents the State of Ohio, whereas in the state court system, he

must deal with County Prosecutor Dennis Watkins.

- Context: Dr. Hammer referred to the "cloak of competence," a psychological term of art, common to mildly retarded persons, who "mask" their deficits. It is said that such persons are intelligent enough to be aware of their failings. Dr. Hammer remarked that these subjects rely on a script, and they can easily by thrown off track. The Petitioner has not demonstrated this failing. Rather, he communicates in context; he uses vocabulary in context; he emphasizes legal points in context. He can fairly well narrate a story with a beginning, middle and an end. It is when he is directed to the topic of the murder of Raymond Fife that the Petitioner disconnects.
- Reading Ability: The Petitioner has read his trial transcript, in his own words: "through and through." He gives the impression of being a frequent reader of the Tribune Chronicle. He reads the New York Times, and relates death penalty cases and issues from other states logically and in context. He can read out loud remarkably well, as he demonstrated during his first session with Gray. (Dr. Olley, Atkins Rebuttal Tr. Vol. VI. Pg. 380-381). He admits to having a "pen pal" in Niles.
- Reasoning Ability: Referring to his efforts to gain newspaper attention in mid 2000, the Petitioner questions whether his efforts

> will "backfire." He later encourages the reporter to write the story that he (Danny Lee Hill) is going to "throw up the flag." He adds that he will write a letter to the Public Defender and to Betty Montgomery (The Attorney General at the time), adding that he will be tested for "competency" when he advises her that he is foregoing further appeals. He refers to the prosecutors "theory" of the case; and he even lectures the reporter on the attorney client privilege, and how it is being ignored. He speaks of the need to "stay focused," a term he uses correctly in several different contexts. He describes the "main focus" of his fellow inmates. And from 20 years ago, he is able to describe people, places, things and events. He suggests that the reporter try to locate his father by checking with the DMV, telling the reporter to "lead him along," And, finally, he speaks philosophically about his friends and relatives who have "turned their backs" on him. He adds insightfully: "if the circle was reversed . . . a whole different story."

The tapes corroborated Gray's testimony that the Petitioner orchestrated the interviews, did most of the talking, sought publicity for himself, read fluently, spoke coherently and responded to questions spontaneously. (Atkins Tr. Vol. IV, p. 1139-1147).

(ii) The Conduct of the Petitioner in Court.

This court had many opportunities to observe the Petitioner over an extended period of time.

- Personal appearance. For the most part he was polite, respectful and well behaved. He appeared to be clean and well groomed. He appeared to be in reasonably good health. In short, there is nothing about his general appearance—facial expressions or conduct—suggesting (at least to a layman) that the Petitioner is mentally retarded.

- Adjusting to Changing Circumstances: Although this court has no way of knowing the depth of the Petitioner's knowledge of the myriad of legal points raised in his behalf by his experienced and thorough counsel, this court is aware from the evidence and court developments that the Petitioner played an active role in the conduct of the hearing on several occasions. During the early stages, he was dissatisfied with the local public defender. He then executed a waiver in open court of that issue in favor of local counsel Maridee Costanzo and her then husband Roger Bauer—both independent contractors to that office. Secretly, he had brought Costanzo and Bauer on board to pursue an "innocence project," essentially intending to gut the *Atkins* hearing. When Hill learned that Bauer was having an affair with one of his (Hill's) prior rape victims, and that Bauer had not filed requested papers in federal habeas corpus, he demanded Bauer's removal. When he learned the true circumstances leading to Costanza's entrée into his case—and her pro neo-Nazi political views—he demanded that she be

removed as well. Then, when he learned that Costanzo had been indicted federally on an interstate murder-for-hire scheme, with the intended victim her husband, Attorney Roger Bauer, the Petitioner sought to have Costanzo brought in as a witness to derail the hearing. The wisdom of his conduct is not for this court to judge. What he did demonstrate was an awareness of changing events, a pattern of self-direction and a commitment to chart his own course.

- Use of Community Resources: Admittedly, the Petitioner's opportunity to use community resources is limited. But he was able to draw newspaper attention from Death Row in the year 2000. This aptitude has not ceased. The State submitted a videotape of unedited news footage from a hearing conducted by this court June 7, 2004, shot by WYTV, the Youngstown ABC affiliate. After the hearing, Petitioner invited the local news media to review an affidavit he had filed with the FBI and added: "If you want to talk to me, set it up with my attorney and I'll give you all an interview on everything."[87]

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[87] Dr. Olley testified that he has evaluated nine other death row inmates to assess whether they were mentally retarded for purposes of escaping execution, and none of those inmates ever called the local news media to initiate an interview. (Atkins Tr. Vol. III, pg. 623). Self-initiated press conferences are germaine to MR issues. See *Hall v. Texas* (2004), 160 S.W. 3d 24, 32 & 40. This is at least the second time that the Petitioner has sought

(iii) Life on Death Row

A number of Penitentiary officials, familiar with the Petitioner's conduct on Death Row at Mansfield, appeared as witnesses:

- Corrections Officer John Glenn: Despite a laundry list of complaints by the Petitioner during his interview by Drs. Hammer, Olley and Huntsman, Officer Glenn related there was no "dumbing down" of job assignments; the prisoner never had seizures (contrary to Hill's history of complaints to the experts); he was not ostracized by his fellow inmates; he played cards with the other inmates; and he was not illiterate.
- Death Row Case Manager Greg Morrow: Familiar with this prisoner since 1998, Officer Morrow verified that the Petitioner is able to communicate by written documents (in Death Row parlance, known as 'kites.'). He plays bingo with fellow inmates. Most notably, the Petitioner was among a handful of inmates assigned to the coveted DR-6, the newest of the Death Row pods. This required the inmate to be "self sufficient," to hold down a job, to maintain acceptable hygienic standards, and to be free of any rules infractions. In exchange, the DR-6 inmates were afforded more freedom. (Atkins Tr. Vol. IV, pg. 1106-1108). Furthermore, the Petitioner kept

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to utilize the news media in his own behalf-the first being the Gray interviews.

track of his own commissary account and executed his own commissary forms.[88]

- Death Row Unit Manager Jennifer Sue Risinger: In contact with the Petitioner daily for some three and half years, Officer Risinger confirmed that Hill always knew how much money he had in his commissary account. (Atkins Tr. Vol. IV, pg. 1220). Before he was transferred to DR-6, Petitioner Hill complained in kites to her about his work assignments. (Atkins Tr. Vol. V, pg. 1195). But he readily accepted his DR-6 assignment. **"His job was to make sure that the chemicals were distributed as directed. And he was told how to do it, explained how to do it. Said he could do it. Did it."** (Atkins Tr. Vol. V, pg. 1194). (Emphasis in bold.)
- Corrections Officer Steven Black: Having daily contact with Danny Lee Hill for 18 months on Death Row, Officer Black never had trouble communicating with him, and in fact, frequently discussed football with him. (Atkins Tr. Vol. V, pg. 1228). **He personally observed Petitioner Hill reading newspapers and reading in the prison library.** (Atkins Tr. Vol. V, p. 1229). According to Officer Black, Hill was a person who could follow the rules. (Atkins Tr. Vol. V, p. 1230). Dr. Hammer recorded one of the most telling points regarding the

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[88] In one instance, he complained he was credited with $3 instead of $16. (Atkins Tr. Vol. IV, pp. 1109-1110).

> Petitioner and his life on Death Row. Here is what he said about his interview of Officer Black: "Mr. Black feels Danny Hill is playing a game to get others to believe he is mentally retarded. **He said Danny's actions changed after he heard of the *Atkins* decision."** (See "Respondent's Submission of Documents [etc.] ... Volume I," Dr. Hammer Report, Page 11.)

Adaptive functioning scores, according to AAMR and the experts, should be judged in context.[89] That a Death Row prisoner is living a restrictive life cannot be denied. But, according to the prison officials Danny Lee Hill's skills are certainly no less than average for a Death Row prisoner.

(iv) The Expert Witnesses.

1. Dr. Hammer: As previously noted, Dr. Hammer has concluded that the Petitioner satisfies Prong I, meaning two standard deviations below the mean. In the words of Dr. Hammer, Danny Lee Hill "keeps bumping up against the ceiling of IQ of 70." This court accepts that testimony. It is to be noted, nevertheless, that Hill demonstrated a full-scale IQ score of 71 on 11-06-2000. With an SEM of 2.32, Dr. Hammer notes that Hill's IQ score could be as low as 69. It is also correct to observe, however, that Hill's

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[89] For example, if a child has only worn Velcro shoes, he may not know how to use laces. Several examples are offered by AAMR regarding limited opportunities to participate in community life, which, for example, would affect shopping skills and the use of money. "This should be taken into account when scores are interpreted." AAMR 10th Ed. pp. 85-86.

IQ could be as high as 73.[90] As for the 2d Prong of MR, however, this court does not accept the opinion of Dr. Hammer. The reason is that the evidence—both anecdotal and psychometrical—simply does not support the psychological opinions of this expert. The available evidence as to the Petitioner's SQ scores—four Vineland test scores—are all above 70. If Vineland is to be rejected, the professional analyst is left with anecdotal evidence. That anecdotal evidence does not support significant limitations in adaptive functioning, either now or during any relevant historical period.

2. Dr. Sparrow: This distinguished academician revised the original Vineland back in the 1970s. However, she was retained to re-score the test that Danny Lee Hill took many years ago. Because her own records demonstrate a mathematical accuracy rate of only 25%, her testimony fails the *Daubert* test. Even if accepted as evidence, her testimony is rejected as lacking in sufficient probative value. This court also notes that Drs. Hammer, Olley and Huntsman all agreed that Vineland is poorly regarded in the field of Modern Psychology. But ill regarded, or highly regarded, the Vineland scores at that time are well above 70. And, considering the Petitioner's adaptive skills today, who is to say that his mother was overstating his skills back then? And who is to say that his teacher was incorrect when she

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[90] According to Dr. Hammer, the SEM (meaning Standard Error of Measurement for Hill's Age group in 2000) was 2.32 up or down. This, according to WAIS-III Technical Manual, pg. 54. See page 12 of Dr. Hammer's report. Respondent's Submission of Documents [etc.] Vol I.

observed in 1981 that "Danny is a bright, perceptive boy with high reasoning ability?"

3 Dr. Hancock: A genuine expert in psychometrics and statistics, with considerable experience in clinical psychology and criminal jurisprudence, Dr. Hancock explained the mathematics supporting his conclusion that Dr. Sparrow's re-scoring of Petitioner's Vineland tests, a look-back period exceeding 20 years, was simply mathematically unreliable. His conclusions were not seriously challenged.

4. Dr. Huntsman: A clinical psychologist, who specializes in forensic psychology for various judicial and executive branches of state and local government in Northeast Ohio, with substantial testing experience, Dr. Huntsman has concluded that the Petitioner is not mentally retarded but that he is considered to be borderline[91] intellectually, coupled with an anti-social personality and a diagnosis of malingering. Her opinion was expressed with reasonable psychological certainty, and was buttressed with substantial analysis. Like Dr. Olley, this expert was struck by the ease with which Danny Lee Hill was able to express legally complex narratives. For example, Hill took her through a cavalcade of attorneys from trial, through direct appeal, into what he described as the "post conviction phase." According to her report, he even advised her that as the case entered into the "post conviction phase," the attorneys withdrew, in order that the

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[91] Borderline MR is one standard deviation below the mean, whereas Mild MR is two standard deviations below the mean. Borderline is not protected under *Atkins*.

new attorney could raise "ineffective assistance of counsel" as an assignment of error. (Respondent's Submission of Documents ... [etc.] Vol. I, pg. 27.)

5. Dr. Olley: A Fellow of AAMR and a Director of the North Carolina Chapter of AAMR, Dr. Olley is a clinical professor, who has qualified as an expert in several States on 8th Amendment jurisprudence and mental retardation. In the past, he has always appeared in support of Death Row prisoners. The signature attribute of adaptive functioning, according to Dr. Olley is self-direction:

> [S]elf-direction, for example, in my view that is very important to the heart of what is meant by mental retardation in an adult.*** The person who can consider all of the factors in his adult functioning and make decisions for the present time, make decisions that will be appropriate in the future. So it's being in control of your own life and doing it without undue influence from other people. So that's the sense in which self-direction is import (Atkins Tr. Vol. III, p. 559).

Recalled to the stand following the discovery of the Gray tapes, Dr. Olley opined that a constellation of attributes demonstrated by the Petitioner were simply incompatible with mental retardation. Examples: recollections of events going back more than a dozen years, descriptions of events in sequence, degree of detail, accurate pronunciation, and remarkable reading ability, including intonation. All of this giving more support to his original opinion that the Petitioner is not now mentally retarded. (Atkins Tr. Rebuttal, Vol. VI, Pg. 381).

In summary, then, this court relies upon the expert opinion of Drs. Huntsman, Hancock and Olley to conclude that the Petitioner has **not** satisfied Prong II of the forensic definition of MR.

C. The Third Prong: Onset Before the Age of Eighteen.

This Court has considered the totality of the evidence in order to determine whether Petitioner Hill manifested onset of both significantly subaverage intellectual functioning *and* significant impairments in adaptive skills prior to age 18. This Court understands that the third prong is as important as the other two, and that without proof of onset before age 18, the diagnosis of mental retardation fails. This is so even where proof of the first two prongs has been satisfied.

In analyzing the third prong—onset before age 18—the fact finder must necessarily revisit prongs one and two. These two prongs will be revisited in three different time frames: the current period, the period of the crimes, and the pre-18 period. It will be helpful to restate the relevant portion of footnote 3 of the U.S. Supreme Court's decision in *Atkins:*

> Mental retardation refers to substantial limitations in **present functioning.** It is characterized by significantly sub-average intellectual functioning, **existing currently** with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

(Emphasis in bold.).

Petitioner Hill scored a 58 on an IQ test administered in prison by the three experts retained to testify in this case. All three agreed that Hill malingered-that it was patently apparent he was "faking bad." Therefore the test score is invalid. This court declines to accept Dr. Hammer's suggestion that Petitioner Hill's true IQ falls currently somewhere in the high 60s. This is merely conjecture. What is not conjecture is the score of 71 that Hill registered in 2000 at the age of 33.

With respect to Prong II for the current time frame—including the Tribune Chronicle interviews by Andrew Gray in the year 2000—the anecdotal evidence portrays a person with remarkable communication skills, armed with correct legal nomenclature, one who speaks in context, one who adjusts his diction to his audience. Prison officials uniformly consider Danny Lee Hill to be fairly well mainstream for a prisoner on Death Row. They consider him average. He was self-sufficient enough to secure and maintain residence for three years in the coveted DR-6. During these Atkins hearings he was able to chart his own course, filing several pro-se motions. He was able to adjust to changing circumstances, particularly the Maridee Costanzo caper, and his secret plan to pursue an innocence project as part of the *Atkins* hearing. He spoke in open court respectfully and in context. In sum, the Petitioner has not presently demonstrated manifestation of Prong II deficiencies.

With respect to the Petitioner at about the ages of 17 to 19, three IQ test scores place him in the mild retardation category, so it is fair to say, and this

court so finds, that the petitioner has satisfied Prong I of the forensic diagnosis of MR. However, deficits in adaptive functioning are not present from the available evidence. In fact the evidence is contra. The Petitioner demonstrated considerable self-direction in the form of a one-man crime spree at the age of 17. He was able to hold his own during police interrogation of the Fife murder. Indeed, the Petitioner demonstrated cunning by appearing at the station house in search of a reward—not nearly as guileless as may have been thought at the time. As one can infer from the information volunteered to Gray, the Petitioner knew he was a suspect and his gambit in appearing was a desperate effort to misdirect the investigation.

Finally, with respect to the Petitioner's early years, this court relies on the opinion of both Dr. Olley and Dr. Huntsman that the evidence is insufficient to warrant a finding of adaptive behavior deficits. This court also notes that Vineland testing scored the Petitioner well above 70 for his SQ abilities, and one of his teachers described him thusly:

> "Danny is a **bright, perceptive boy with high reasoning ability.** But his defiant attitude and refusal to obey any known authority hinders his learning. He is lazy, often verbally abusive, intimidating to other students and will bribe or steal for his own benefit." (Emphasis in Bold.)
>
> (Atkins Tr., Vol. II, pg. 398.)

And in the words of J. Gregory Olley, Ph.D.:

> As we have repeatedly emphasized here, all three prongs of the definition [of MR] should be satisfied for a valid diagnosis.
>
> (Atkins Tr. Vol. III, pg. 795).

Dr. Olley added that he evaluated the evidence and that the Petitioner did not satisfy the diagnosis of MR at any of "the three points in time that we examined."

IX. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court has been called upon to rule whether Petitioner Danny Lee Hill has met his burden of proof on his claim of mental retardation. Under guiding principles laid down by the Supreme Court of the United States, and by the Supreme Court of Ohio, this court has held hearings, conducted its own *de novo* review of the evidence in order to determine the ultimate issue, relied upon professional evaluations, appointed experts, issued findings of fact herein, and, finally, set forth its rationale for finding the Defendant/Petitioner **not** mentally retarded.

Specifically:

- This Court finds that the burden of proof, meaning the risk of non-persuasion (Evidence Rule 301) has remained throughout these proceedings upon the Petitioner to prove by a preponderance of the evidence that he is mentally retarded.
- This court finds that the Petitioner has failed to meet his burden to prove mental

retardation, as forensically defined in accordance with law.

- This court finds that the Petitioner Danny Lee Hill is **not** mentally retarded.

X. ORDER

For the reasons set forth above, and upon due consideration, this court **DENIES** the Petition for Post Conviction Relief of Defendant Petitioner Danny Lee Hill. **FINAL.**

SO ORDERED THIS 15th DAY OF FEBRUARY, 2006

/s/ Judge Thomas Patrick Curran
Sitting by Assignment
Art. IV Sec. 6 Ohio Constitution

TO THE CLERK OF COURT: YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT ON ALL COUNSEL OF RECORD FORTHWITH BY ORDINARY MAIL.

s/ Judge Thomas Patrick Curran
Judge Thomas Patrick Curran

INDEX

I.	INTRODUCTION	1
II.	GUIDELINES OF THE OHIO SUPREME COURT FOR THE CONDUCT OF AN ATKINS HEARING	3
III.	MENTAL RETARDATION – THE FORENSIC DEFINITION	4
IV.	PROCEDURAL HISTORY, MOTION PRACTICE AND MISCELLANEOUS EVENTS	5
	A. Procedural History of Recent Collateral Litigation	6
	B. Procedural History of the Underlying Case	7
	C. The Petitioner's Motion Practice on His Atkins Claim	8
	1. Motion to Void the Death Sentence	9
	2. Motion to Fix the Time Frame	14
	3. Motion to Convene a Jury As The Atkins Fact-Finder	16
	4. Motion to Limit The Appointment Of Experts	18
	D. Miscellaneous Events Surrounding The Atkins Hearing	22
V.	THE EXPERTS ON MENTAL RETARDATION	34
	A. Dr. David Hammer	34
	B. Dr. J. Gregory Olley	35
	C. Dr. Nancy Huntsman	35
	D. Dr. Sara S. Sparrow	36
	E. Dr. Timothy Hancock	37
VI.	THE METHODOLOGY	38
VII.	THE UNDERLYING CASE	40
	A. The Crimes	40

B. Mental Health Issues In The Underlying Case 43
C. Res Judicata Revisited 47
VIII. THE ATKINS ISSUES 50
A. The First Prong: Significantly Subaverage Intellectual Functioning 50
1. Pre-Atkins IQ History - Age 6 to 33 51
2. Court Ordered Testing Under the Guidance of Atkins and Lott 53
3. Judicial Fact-Finding on Prong I: Significantly Subaverage Intellectual Functioning 54
B. The Second Prong: Significant Limitations in Two or More Adaptive Skills, Such as Communication, Self Care and Self Direction 55
1. Vineland Social Maturity Scale-A Psychometric Test 60
2. Vineland Revised and Re-visited-The Sparrow Project 63
3. The Daubert Analysis 65
4. Anecdotal Evidence and Prong II 68
a. The Petitioner's Early Years 68
b. The Petitioner at 17 to 18, Including the Murder and Trial 70
c. The Petitioner as a Prisoner on Death Row 72
i. The Andrew Gray Interviews 73
ii. The Conduct of the Prisoner in Court 76
iii. Life on Death Row 77
iv. The Expert Witnesses 79

	C. The Third Prong: Onset Before the Age of Eighteen	81
IX.	FINDINGS OF FACT AND CONCLUSIONS OF LAW	83
X.	ORDER	84

APPENDIX I

STATE v. HILL

Supreme Court of Ohio

April 8, 1992, Submitted

August 12, 1992, Decided

No. 90-177

OPINION

Criminal law—Aggravated murder—Death penalty upheld, when.

[*313] On September 10, 1985, at approximately 5:15 p.m., twelve-year old Raymond Fife left home on his bicycle to visit a friend, Billy Simmons. According to Billy, Raymond would usually get to Billy's residence by cutting through the wooded field with bicycle paths located behind the Valu-King store on Palmyra Road in Warren.

Matthew Hunter, a Warren Western Reserve High School student, testified that he went to the Valu-King on the date in question with his brother and sister shortly after 5:00 p.m. Upon reaching the front of the Valu-King, Hunter saw Tim Combs and defendant-appellant, Danny Lee Hill, walking in the parking lot towards the store. After purchasing some items in the Valu-King, Hunter observed defendant and Combs standing in front of a nearby laundromat. Combs greeted Hunter as he walked by. Hunter also

saw Raymond Fife at that time riding his bike into the Valu-King parking lot.

Darren Ball, another student at the high school, testified that he and Troy Cree left football practice at approximately [***2] 5:15 p.m. on September 10, and walked down Willow Street to a trail in the field located behind the Valu-King. Ball testified that he and Cree saw Combs on the trail walking in the opposite direction from the Valu-King. Upon reaching the edge of the trail close to the Valu-King, Ball heard a child's scream, "like somebody needed help or something."

Yet another student from the high school, Donald E. Allgood, testified that he and a friend were walking in the vicinity of the wooded field behind the Valu-King between 5:30 p.m. and 6:00 p.m. on the date in question. Allgood noticed defendant, Combs and two other persons "walking out of the field coming from Valu-King," and saw defendant throw a stick back into the woods. Allgood also observed Combs pull up the zipper of his blue jeans. Combs "put his head down" when he saw Allgood.

At approximately 5:50 p.m. on the date in question, Simmons called the Fife residence to find out where Raymond was. Simmons then rode his bicycle to [*314] the Fifes' house around 6:10 p.m. When it was apparent that Raymond Fife's whereabouts were unknown, Simmons continued on to a Boy Scouts meeting, while members of the Fife family began searching for [***3] Raymond.

At approximately 9:30 p.m., Mr. Fife found his son in the wooded field behind the Valu-King. Raymond was naked and appeared to have been severely beaten and burnt in the face. One of the

medics on the scene testified that Raymond's groin was swollen and bruised, and that it appeared that his rectum had been torn. Raymond's underwear was found tied around his neck and appeared to have been lit on fire.

Raymond died in the hospital two days later. The coroner ruled Raymond's death a homicide. The cause of death was found to be cardiorespiratory arrest secondary to asphyxiation, subdural hematoma and multiple trauma. The coroner testified that the victim had been choked and had a hemorrhage in his brain, which normally occurs after trauma or injury to the brain. The coroner also testified that the victim sustained multiple burns, damage to his rectal-bladder area and bite marks on his penis. The doctor who performed the autopsy testified that the victim sustained numerous external injuries and abrasions, and had a ligature mark around his neck. The doctor also noticed profuse bleeding from the victim's rectal area, and testified that the victim had been impaled [***4] with an object that had been inserted through the anus, and penetrated through the rectum into the urinary bladder.

On September 12, 1985, defendant went downtown to the Warren Police Station to inquire about a $5,000 reward that was being offered for information concerning the murder of Raymond Fife. Defendant met with Sergeant Thomas W. Stewart of the Warren Police Department and told him that he had 'just seen Reecie Lowery riding the boy's bike who was beat up." When Stewart asked defendant how he knew the bike he saw was the victim's bike, defendant replied, "I know it is." Defendant then told

Stewart, "If you don't go out and get the bike now, maybe [Lowery will] put it back in the field." According to Stewart, the defendant then stated that he had seen Lowery and Andre McCain coming through the field at around 1:00 that morning. In the summary of his interview with defendant, Stewart noted that defendant "knew a lot about the bike and about the underwear around the [victim's] neck." Also, when Stewart asked defendant if he knew Tim Combs, defendant replied, "Yeah, I know Tim Combs. * * * I ain't seen him since he's been out of the joint. He like boys. He could have [***5] done it too."

On September 13, 1985, the day after Stewart's interview with defendant, Sergeant Dennis Steinbeck of the Warren Police Department read Stewart's summary of the interview, and then went to defendant's home and asked him to come to the police station to make a statement. Defendant voluntarily [*315] went to the police station with Steinbeck, whereupon defendant was advised of his *Miranda* rights and signed a waiver of rights form. Defendant made a statement that was transcribed by Steinbeck, but the sergeant forgot to have defendant sign the statement. Subsequently, Steinbeck discovered that some eyewitnesses had seen defendant at the Valu-King on the day of the murder.

On the following Monday, September 16, Steinbeck went to defendant's house accompanied by defendant's uncle, Detective Morris Hill of the Warren Police Department. Defendant again went voluntarily to the police station, as did his mother. Defendant was given his *Miranda* rights, which he waived at that time as well. After further questioning by Sergeants Stewart and Steinbeck and

Detective Hill, defendant indicated that he wanted to be alone with his uncle, Detective Hill. Several minutes later, [***6] defendant stated to Hill that he was "in the field behind Valu-King when the young Fife boy got murdered."

Defendant was given and waived his *Miranda* rights again, and then made two more voluntary statements, one on audiotape and the other on videotape. In both statements, defendant admitted that he was present during the beating and sexual assault of Raymond Fife, but that Combs did everything to the victim. Defendant stated that he saw Combs knock the victim off his bike, hold the victim in some sort of headlock, and throw him onto the bike several times. Defendant further stated that he saw Combs rape the victim anally and kick him in the head. Defendant stated that Combs pulled on the victim's penis to the point where defendant assumed Combs had pulled it off. Defendant related that Combs then took something like a broken broomstick and jammed it into the victim's rectum. Defendant also stated that Combs choked the victim and burnt him with lighter fluid. While defendant never admitted any direct involvement in the murder, he did admit that he stayed with the victim while Combs left the area of the attack to get the broomstick and the lighter fluid used to burn the victim.

[***7] Upon further investigation by authorities, defendant was indicted on counts of kidnapping, rape, aggravated arson, felonious sexual penetration, aggravated robbery and aggravated murder with specifications.

On December 16, 1985, a pretrial hearing was held on defendant's motion to suppress statements made to police officers both orally and on tape. On January 17, 1986, the court of common pleas concluded as follows:

> "It is the opinion of this Court that no Fourth Amendment violation was shown because [defendant] was at no time 'seized' by the police department, but rather came in either voluntarily, or as in the case of September 16th because of his mother's demands.
>
> "* * *
>
> [*316] "Defendant's Fifth Amendment Rights were clearly protected by the numerous *Miranda* Warnings and waivers. Though this court believes that the defendant could not have effectively read the rights or waiver forms, the Court relies on the fact that at any time he was give a piece of paper to sign acknowledging receipt of the *Miranda* Warnings and waiving his rights, the paper was always read to him before he affixed any of his signatures.
>
> "Though defendant is retarded, he is not [***8] so seriously impaired as to have been incapable of voluntarily and knowingly given statements which the defendant now seeks to suppress. The Court reaction is conclusion after seeing and listening to the defendant at the Suppression Hearing and listening to and watching the tape recording and videotaped statements of the defendant. The Court concludes that the statements were made voluntarily, willingly, and knowingly."

Meanwhile, on January 7, 1986, defendant appeared before the trial court and executed a waiver of his right to a jury trial.

On January 21, 1986, defendant's trial began in front of a three-judge panel. Among the voluminous testimony from witnesses and the numerous exhibits, the following evidence was adduced:

> Defendant's brother, Raymond L. Vaughn, testified that he saw defendant wash his gray pants on the night of the murder as well as on the following two days. Vaughn identified the pants in court, and testified that it looked like defendant was washing out "something red. * * * It looked like blood to me * * *."

Detective Sergeant William Carnahan of the Warren Police Department testified that on September 15, 1985 he went with eyewitness [***9] Donald Allgood to the place where Allgood stated he had seen defendant and Combs coming out of the wooded field, and where he had seen defendant toss "something" into the woods. Carnahan testified that he returned to the area with workers from the Warren Parks Department, and that he and detective James Teeple found a stick about six feet from the path where Allgood saw defendant and Combs walking.

Dr. Curtis Mertz, a forensic odontologist, stated that: "It's my professional opinion, with reasonable degree of medical certainty, Hill's teeth, as depicted by the models and the photographs that I had, made the bite on Fife's penis."

The defense called its own forensic odontologist, Dr. Lowell Levine, who stated that he could not

conclude with a reasonable degree of certainty as to who made the bite marks on the victim's penis. However, Levine concluded: "What I'm saying is either Hill or Combs, or both, could have left some of the [*317] marks but the one mark that's consistent with the particular area most likely was left by Hill."

Doctor Howard Adelman, the pathologist who performed the autopsy of the victim's body, testified that the size and shape of the point of the stick [***10] found by Detective Carnahan was "very compatible" with the size and shape of the opening through the victim's rectum. Adelman described the fit of the stick in the victim's rectum as "very similar to a key in a lock."

At the close of trial, the trial panel deliberated for five hours and unanimously found defendant guilty on all counts, except the aggravated robbery count and the specification of aggravated robbery to the aggravated murder count.

Pursuant to R.C. 2929.04(B), a mitigation hearing was held by the three-judge panel beginning on February 26, 1986. The panel received testimony, and thereafter weighed the aggravating circumstances against the mitigating factors. The panel then sentenced defendant to ten to twenty-five years' imprisonment for both aggravated arson and kidnapping, life imprisonment for rape and felonious sexual penetration, and the death penalty for aggravated murder with specifications.[1]

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[1] Timothy Combs was also charged and convicted as a principal offender in the murder of Raymond Fife. *See State v. Combs* (Dec. 2, 1988), Portage App. No. 1725, unreported, 1988 WL 129449.

Upon appeal, the court of appeals affirmed the panel's [***11] judgment of conviction and sentence.

The cause is now before this court upon an appeal as of right.

COUNSEL: Dennis Watkins, Prosecuting Attorney, and Peter J. Kontos, for appellee.

Tataru, Wallace & Warner and Roger Warner; Tyack, Wright & Turner and Carol A. Wright, for appellant.

OPINION BY: SWEENY, J.

OPINION

[**889] Pursuant to R.C. 2929.05(A), this court is required to undertake a three-prong analysis in reviewing the instant death penalty case. First, we will consider the specific issues raised by defendant with respect to the proceedings below. We will review all of defendant's propositions of law, even though some may be deemed to have been waived since they were not raised below. [**890] Second, we will independently weigh the aggravating circumstances in this case against all factors which mitigate against the imposition of the death sentence. Third, we will independently consider whether defendant's [*318] sentence is appropriate or disproportionate to the penalty imposed in similar cases.

In his first proposition of law, defendant contends that his Sixth and Fourteenth Amendment right to counsel was violated because he was deprived of counsel during custodial interrogation. [***12] Defendant further contends that he could not waive

his right to counsel and that his statements to the police were not voluntary since he is mentally retarded.

With respect to waiver, the United States Supreme Court in *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473, reaffirmed its prior holding in *Lego v. Twomey* (1972), 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618, that the state carries the burden of proving the voluntariness of a confession by a preponderance of the evidence. However, *Connelly* also holds that evidence of police coercion or overreaching is necessary for a finding of involuntariness, and not simply evidence of a low mental aptitude of the interrogee. *Id.*, 479 U.S. at 164, 107 S.Ct. at 520, 93 L.Ed.2d at 482-483; see *State v. Clark* (1988), 38 Ohio St.3d 252, 527 N.E.2d 844. See, also, *United States v. Young* (E.D.Pa.1973), 355 F.Supp. 103, where the court held that a defendant with an IQ of 57 could voluntarily waive his *Miranda* rights due to his "extensive dealings with the criminal process." *Id.* at 111.

The record herein indicates that defendant made a statement to Sergeant Steinbeck after waiving his [***13] *Miranda* rights, but that Steinbeck apparently forgot to have defendant sign his transcribed statement. Subsequently, Steinbeck and Detective Hill went to defendant's home to have him sign the statement and have his mother make a statement concerning defendant's whereabouts on the day of the Fife murder. Defendant and his mother voluntarily went to the police station with the officers where he was again given his *Miranda* rights before and during the time he made some

incriminating statements to the police officers concerning his presence at the murder.

In our view, defendant's arguments are without merit. Upon a careful review of the record, we can discern no coercive or overreaching tactics employed by the police during questioning. Based on *Connelly, supra*, this court's ruling in *State v. Jenkins* (1984), 15 Ohio St.3d 164, 233, 15 OBR 311, 370-371, 473 N.E.2d 264, 321-322, and his prior dealings with the criminal process as a juvenile, defendant's mental aptitude did not undercut the voluntariness of his statements or his waiver of *Miranda* rights. Accordingly, we overrule defendant's first proposition of law.

In his second proposition of law, defendant asserts [***14] that his statements to the Warren police officers were not voluntary since the statements were the result of psychological tactics employed by the police on a retarded individual who is essentially illiterate. Defendant contends that the admission of such [*319] statements violates the Due Process Clauses of both the United States and Ohio Constitutions.

Defendant's arguments in this respect are based on his relationship with his uncle, Morris Hill, a detective with the Warren Police Department. Detective Hill testified that prior to defendant's reaching the age of eighteen, he would at times physically discipline defendant at the request of defendant's mother.

A review of the record indicates that immediately prior to defendant's first admission that he was present at the murder of the victim, he was left alone with Detective Hill. Shortly thereafter, Detective Hill

summoned the other interrogating police officers and stated that defendant was going to tell what he knew about the murder. Defendant testified at the suppression hearing that Detective Hill kicked him under the table in order to make him start talking when the officers began to tape his statement. Defendant [***15] argues that taking into account the totality of circumstances, it is apparent that the taperecorded statement and the videotape statement were involuntary, especially when one considers [**891] the psychological ploy used by the police on him, a retarded individual, that another person (Tim Combs) was going to blame him for the murder.

Upon a careful review of the testimony and the audiotape and videotape statements, we do not find that the interrogation tactics used by the police officers, even in light of defendant's mental capacity, rendered the statements involuntary, or that the officers improperly induced the defendant to make incriminating statements. In *State v. Jackson* (1977), 50 Ohio St.2d 253, 4 O.O.3d 429, 364 N.E.2d 236, this court upheld a confession that ensued after detectives told a suspect that others had implicated him in the commission of a criminal offense.

In our view, the trial court correctly determined that the statements made by defendant were voluntary. Therefore, we find defendant's second proposition of law to be without merit.

In his third proposition of law, defendant argues that the state failed to establish that he was properly given his *Miranda* [***16] rights, or that he knowingly, voluntarily and intelligently waived such rights.

Contrary to defendant's arguments, the record amply supports the fact that defendant was given his *Miranda* rights several times, and that during each of these times such rights were knowingly, voluntarily and intelligently waived by defendant. See *Young, supra*. Thus, we find defendant's third proposition of law to be not well taken.

[*320] In his fourth proposition of law, defendant asserts that his Fourth and Fourteenth Amendment rights were violated when he was seized from his home through the use of psychological ploys by the police officers.

Our review of the record, however, indicates that defendant voluntarily went with the police officers to the police station at the urging of his mother. Defendant was not taken into custody at the time the police officers brought him to the police station; the police had come to his home to try to get him to go to the police station to sign the prior statement he had made to Sergeant Steinbeck. The officers also wanted to get a statement from defendant's mother concerning defendant's whereabouts on the day of the Fife murder. In addition, defendant [***17] indicates on the audiotape made on September 16, 1985 that he was not under arrest when he went to the police station and that he gave his statement voluntarily.

Under these circumstances, we find defendant's fourth proposition of law to be wholly without merit.

In his fifth proposition of law, defendant contends that he was denied his right to due process when he was denied his statutory right to counsel pursuant to R.C. 120.16, 2935.14 and 2935.20.

We cannot, however, find any evidence supporting defendant's contention that he was denied his right to counsel. The record indicates that that at no time did defendant ever request an attorney. While it is true that defendant's mother, Vera Williams, testified that she asked her brother, Detective Hill, if she should hire an attorney, and he told her that it would not be necessary since an appointed attorney would be assigned to the defendant, there is no credible evidence in the record that defendant ever invoked his right to counsel either before or during the times he talked to the police officers. In addition, defendant was not under arrest at the time in question and had come voluntarily to the police station.

As this court [***18] noted in *State v. Benner* (1988), 40 Ohio St.3d 301, 310, 533 N.E.2d 701, 711-712, in the context of *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, a person must affirmatively articulate a request for counsel in order for the right to attach during interrogation. See *United States v. Pearson* (C.A.11, 1984), 746 F.2d 787, 793.

Even assuming, *arguendo*, that defendant's statements should have been suppressed, the other evidence in the instant cause is so overwhelming as to render any error harmless beyond a reasonable doubt. [**892] Accordingly, we reject defendant's fifth proposition of law.

[*321] In his sixth proposition of law, defendant alleges that the police failed to comply with R.C. 2935.05,[2] and that his arrest was therefore illegal,

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[2] R.C. 2935.05 provides as follows:

and any statements derived therefrom must be suppressed.

[***19] The record indicates that defendant was arrested on September 16, 1985, and that charges were filed the very next day. In our view, defendant's argument of unnecessary delay is wholly unpersuasive. Even if we were to find that the alleged delay was unnecessary and violated the statute, the statutory violation would not compel suppression of the statements in the absence of any constitutional infringement. See *State v. Cowans* (1967), 10 Ohio St.2d 96, 39 O.O.2d 97, 227 N.E.2d 201. Therefore, we overrule defendant's sixth proposition of law.

In his seventh proposition of law, defendant asserts that the statements he gave to the police officers were made under the impression that he would receive leniency or some other benefit. Inasmuch as he received no leniency, defendant argues that the statements made should be inadmissible in any later trial.

In our view, defendant's argument is without support. The record is totally devoid of anything that

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"When a person named in section 2935.03 of the Revised Code has arrested a person without a warrant, he shall, without unnecessary delay, take the person arrested before a court or magistrate having jurisdiction of the offense, and shall file or cause to be filed an affidavit describing the offense for which the person was arrested. Such affidavit shall be filed either with the court or magistrate, or with the prosecuting attorney or other attorney charged by law with prosecution of crimes before such court or magistrate and if filed with such attorney he shall forthwith file with such court or magistrate a complaint, based on such affidavit."

could be remotely characterized as a plea-bargain arrangement between defendant and the police officers. Accordingly, we summarily overrule defendant's seventh proposition of law.

In his eighth proposition of law, defendant contends [***20] that trial court committed prejudicial error by admitting into evidence other crimes, wrongs or acts committed by defendant. Defendant submits that in so doing, the trial court violated R.C. 2945.59, Evid.R. 404(B) and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The error complained of in this vein involves the testimony of three witnesses for the prosecution. Candyce S. Jenkins testified that in March 1984, defendant went to her house, broke a window with his fist, and entered the premises carrying a knife. Jenkins stated that defendant raped her twice anally, once vaginally, and made her perform fellatio on him.

Jenkins further testified that defendant bit her on the back and on the breast during the rape, and told her that he was going to stick the knife up [*322] her rectum, cut out her vagina and cut off her breasts. Jenkins also stated that defendant threatened to rape her baby, who was in another room in the house, and cut her up. Jenkins stated that she was able to escape from defendant while he put his pants back on, and that she saw defendant flee to the field behind the Valu-King. Defendant later pled guilty to the rape [***21] in juvenile court.

Mary Ann Brison testified that she was raped at knifepoint by defendant on the morning of February

8, 1984 while walking on a path leading from the Valu-King.

Stephen Melius testified that he was a cellmate of defendant in the Juvenile Justice Center during the winter of 1984. Melius stated that defendant put his hand on him and expressed a desire to perform anal intercourse and fellatio on him. Melius testified that he refused both the defendant's advances and the invitation to perform anal intercourse and fellatio with defendant.

Evid.R. 404(B) provides:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, [**893] however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

R.C. 2945.59 states as follows:

> "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, [***22] the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the

> commission of another crime by the defendant."

In our view, the testimony of all three witnesses was properly admitted since such testimony tended to show the motive, plan and identity of defendant. See *Benner, supra,* 40 Ohio St.3d at 306, 533 N.E.2d at 708.

In *State v. Flonnory* (1972), 31 Ohio St.2d 124, 126, 60 O.O.2d 95, 96-97, 285 N.E.2d 726, 729, this court observed:

> "Much confusion about R.C. 2945.59 might be avoided if it were observed that nowhere therein do the words 'like' or 'similar' appear. *The statute permits the showing of 'other acts' when such other acts 'tend to show' certain things.* If such other acts do in fact 'tend to show' any of those [*323] things they are admissible notwithstanding they may not be 'like' or 'similar' to the crime charged." (Emphasis added.)

Likewise, in *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180, this court held in the syllabus:

> "Other [***23] acts forming a unique, identifiable plan of criminal activity are admissible to establish identity under Evid.R. 404(B). To be admissible these other acts must tend to show by substantial proof 'identity' or other enumerated purposes under Evid.R. 404(B). Although the standard for admissibility is strict, the other acts need not be the same as or similar to the crime charged. * * *"

In light of these precedents, we believe that Jenkin's testimony tended to identify defendant as an assailant of Fife because similarly to the instant murder, defendant left his mark by biting Jenkins during the commission of the rape. Defendant's threat to Jenkins that he would stick the knife up her rectum is similar to what was perpetrated on Fife, except with a broken broom-like handle.

Brison's testimony tended to show defendant's plan to attack and rape in the same wooded field area behind the Valu-King where Fife was brutalized.

Melius's testimony tended to show defendant's motive to forcibly have sex with another male.

In any event, even if the admission of the testimony was improper, since the case was tried before a three-judge panel, it must affirmatively appear on the record that the [***24] panel relied on the alleged improper testimony. *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754, 759.

Given that the trial panel stated in its opinion weighing the aggravating circumstances against the mitigating factors that "no prior crimes were considered by the Court in any way in reaching its verdict," we fail to see how defendant was prejudiced. Accordingly, we overrule defendant's eighth proposition of law.

In his ninth proposition of law, defendant submits that his rights to due process and a fair and impartial trial were violated when the trial court admitted evidence that was not relevant, or whose relevance was outweighed by its prejudicial effect.

The first example of error raised by defendant concerns the testimony of Raleigh Hughes, an ambulance attendant who arrived at the murder scene, who commented on the condition of the victim's body. In summarizing his impression of what he saw, Hughes stated that it was "one of the most gruesome things I've ever seen."

[*324] While Hughes's testimony in this respect should probably not have been admitted, there has been no showing of prejudice [***894] that overcomes the presumption that the three-judge panel [***25] considered only the relevant, nonprejudicial evidence submitted. See *Post*, *supra*.

Defendant next challenges the admission of the broomstick into evidence by arguing that there was no probative value in its admission. However, we believe that admission of the stick was properly justified for several reasons: (1) Donald Allgood testified that he saw defendant "flick" a stick into the woods at the time and near the place where the homicide took place; (2) defendant stated on tape that Tim Combs stuck "[a] stick * * * [l]ike a broom handle thing" in the victim's rectal opening; and (3) Dr. Adelman testified that the shape of the stick in comparison to the injury inflicted in the victim's rectum was "very similar to a key in a lock." Given the foregoing testimony, we find that the stick was properly admitted into evidence during the trial.

Lastly, defendant alleges error in the testimony of Dr. Adelman that asphyxia by strangulation can cause a penile erection. In our view, however, such testimony was relevant in supplementing the testimony of Dr. Mertz to explain the differences in

the size of the marks made on the victim's penis and the bite impression taken of defendant.

[***26] Based on all the foregoing, we find defendant's ninth proposition of law to be not well taken.

Defendant, in his tenth proposition of law, contends he was denied a fair trial because the trial court admitted into evidence State's Exhibit 47, the broomstick. Defendant argues under this proposition that the stick should not have been admitted because it caused the trial court to erroneously draw an inference from another inference. In support, defendant relies on *Sobolovitz v. Lubric Oil Co.* (1923), 107 Ohio St. 204, 140 N.E. 634.

Upon a careful review of the record, we believe that the facts adduced during trial led the court to draw only one inference: that the stick was used on the victim and, thus, was properly admitted. The admission by defendant that "a broom handle thing" was used, Allgood's testimony that he saw defendant "flick" a stick into the woods, Dr. Adelman's "key in a lock" testimony, and plant fibers found in the victim's rectum all supported the single inference that the stick was used on the victim. Also, passing over the fact that the *Sobolovitz* holding was later limited, we find that it is readily distinguishable from the cause *sub judice*. Accordingly, [***27] we overrule defendant's tenth proposition of law.

In his eleventh proposition of law, defendant asserts that his right to confrontation of witnesses against him was violated when the prosecutor consulted a witness who was subject to recall and who was a surprise witness [*325] of which defense counsel had no prior knowledge. In support of his

argument, defendant relies on *Davis v. Alaska* (1975), 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347, and *State v. Prater* (1983), 13 Ohio App.3d 98, 13 OBR 114, 468 N.E.2d 356.

We believe, however, that neither of these cases is on point or supports defendant's assertion. When the witness complained of, Stephen Melius, was recalled as a witness, he was questioned by defense counsel with respect to his contacts with the prosecution.[3] A

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[3] Upon recall, the following exchange took place between defense counsel and Stephen Melius:

"Q. * * * have you had an occasion to talk with any officers of the Warren Police Department prior to the time you arrived here today and were sitting in the hallway?

"A. Yes, sir.

"* * *

"Q. And who were those officers?

"A. This guy sitting right here (indicating).

"Q. This guy sitting right here (indicated)? Pete? Technically, he's an officer. Pete. And what'd Pete talk to you about?

"A. He just told me that you guys were going to subpoena me back into Court, and he told me some of the questions that you might ask me.

"Q. Oh, he did! Oh! Okay. That's interesting. What kind of questions did he tell [you] I was going to ask you?

"A. He said you might -- that you might ask me that I gave some of the wrong dates and stuff like that.

"Q. Okay. Remember anything else?

"A. Um-hum. No.

"Q. Well, how'd you answer the questions? What did he ask you specifically?

review of the testimony [**895] and other evidence reveals that the defendant's right to confrontation was not infringed, nor was his opportunity for cross-examination denied or restricted. Even if we were to assume that Melius was in fact a surprise witness, the defendant had a full and fair opportunity to cross-examine on Melius's limited testimony and, thus, any error was rendered harmless. Accordingly, [***28] we find defendant's eleventh proposition of law to be unmeritorious.

[***29] In his twelfth proposition of law, defendant argues that he was denied due process because the pool of prospective jurors was drawn from only licensed drivers who were registered voters, and that such pool did not reflect a fair cross-section of the community.

[*326] Contrary to defendant's argument, the great weight of authority supports the validity of voter registration lists as the sole source of prospective jurors. See, *e.g.*, *State v. Johnson* (1972), 31 Ohio St.2d 106, 60 O.O.2d 85, 285 N.E.2d 751,

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"A. He asked me if -- that I was -- that I gave you the wrong dates about the times me and Danny Lee Hill were in JJC together.

"Q. He told you you gave the wrong dates?

"A. Yes.

"Q. I see. What else did he tell you?

"A. That's about it.

"Q. That's about it?

"A. Um-hum.

"Q. Okay. * * *."

paragraph two of the syllabus. Accord *State v. Spirko* (1991), 59 Ohio St.3d 1, 35-36, 570 N.E.2d 229, 265.

In any event, defendant waived his right to a jury trial and opted for a trial before a three-judge panel. Under these circumstances, the denial of defendant's motion by the trial court to expand the pool of potential jurors did not prejudice him. Therefore, we summarily overrule defendant's twelfth proposition of law.

In his thirteenth proposition of law, defendant contends that the trial court failed to determine on the record whether his waiver of a jury trial was made knowingly, intelligently and voluntarily.

We have reviewed the record regarding defendant's [***30] waiver and believe his argument in this vein is totally devoid of merit. As this court pointed out in *State v. Jells* (1990), 53 Ohio St.3d 22, 26, 559 N.E.2d 464, 468: "The Criminal Rules and the Revised Code are satisfied by a written waiver, signed by the defendant, filed with the court, and made in open court, after arraignment and opportunity to consult with counsel."

Since the trial court amply fulfilled the requirements set forth in *Jells*, *supra*, we find defendant's thirteenth proposition of law to be not well taken.

In his fourteenth proposition of law, defendant asserts that the trial court committed reversible error in denying him the funds necessary to employ an expert for purposes of a motion for closure of a pretrial hearing that was necessary to preserve a fair and impartial jury.

We find this assertion to be without merit. Even assuming that the trial court erred in this vein, any prejudice to defendant was eliminated by his subsequent waiver of his right to a trial by jury. Accordingly, we summarily reject defendant's fourteenth proposition of law.

In his fifteenth proposition of law, defendant argues that the trial panel abused its discretion in admitting [***31] a predeath photograph of the victim and permitting the victim's mother to testify about her family. Defendant submits that introduction of such sympathy testimony constitutes reversible error.

In our view, defendant's claim of error is without merit. Defendant tries to raise Miriam Fife's testimony to the level of an impermissible victim-impact statement proscribed by *Booth v. Maryland* (1987), 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440, but a careful review of her testimony reveals nothing even remotely approaching impermissible "victim impact evidence." In any [*327] event, we note once again that the cause was tried before a three-judge panel and not a jury, and we find nothing which would indicate that the three-judge [**896] panel relied on such evidence in arriving at its sentence. *Post, supra.* Therefore, we overrule defendant's fifteenth proposition of law.

Defendant, in his sixteenth proposition of law, contends that his rights to a fair trial and to effective assistance of counsel were violated by the state's repeated failure to comply with the discovery requirements of Crim.R. 16. Specifically, defendant submits that the state failed to provide the following discoverable [***32] information: (1) Donald

Allgood's identification of defendant from a photo array, (2) the photo array itself, (3) photos of defendant with officers at the crime scene and accompanying oral statements of defendant, (4) the testimony of Stephen Melius, and (5) photos utilized by defense witness Dr. Levine in his testimony regarding the bite marks on the victim's penis.

In *State v. Wickline* (1990), 50 Ohio St.3d 114, 117, 552 N.E.2d 913, this court reaffirmed the standard of "materiality" set forth in *State v. Johnston* (1988), 39 Ohio St.3d 48, 61, 529 N.E.2d 898, 911, paragraph five of the syllabus:

> "In determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. This standard of materiality applies regardless of whether the evidence is specifically, generally or not at all requested by the defense. (*United States v. Bagley* * * * [1984], 473 U.S. 667 [105 [***33] S.Ct. 3375, 87 L.Ed.2d 481], followed.)"

Upon reviewing the items enumerated by defendant, we find that his contentions in this respect are without merit. With regard to the pictures used by Dr. Levine, we point out that he was defendant's expert witness and it is undisputed the defense was aware, through discovery, that Dr. Levine concluded the bite marks could have been

made by defendant. Even if defendant had had the photographs used by Dr. Levine, the outcome of the trial would not have been different.

We also discern no prejudice to defendant from the state's failure to supply the photo array used by Donald Allgood. The photo array was not introduced at trial and was not "material" under the *Johnston* test.

With respect to the photos of defendant with the officers at the crime scene, we note that the trial panel did, pursuant to Crim.R. 16(E)(3), offer defendant a continuance, but defendant declined. The statements made by defendant at [*328] the crime scene were never transcribed. Once again, we find no prejudicial error in the state's failure to supply such photos pursuant to Crim.R. 16.

In regard to the testimony of Stephen Melius, we believe that such testimony [***34] although of some relevance, was not crucial and merely dealt with a collateral similar act. In addition, the defense cross-examined Melius and recalled him as a witness the day after his initial testimony. Defendant has not articulated how Melius's testimony was "material" or would have affected trial preparation, strategy or outcome. In any event, the trial panel stated that it disregarded defendant's prior acts.

Since we believe that no prejudicial error has been shown, we overrule defendant's sixteenth proposition of law.

In his seventeenth proposition of law, defendant argues that the trial panel abused its discretion in admitting photographs of the victim that he

characterizes as "highly prejudicial, gross and unnecessary" and lacking in probative value.

In *State v. Maurer* (1984), 15 Ohio St.3d 239, 266, 15 OBR 379, 402, 473 N.E.2d 768, 792, this court stated that "[p]roperly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative of testimony and other evidence, as long as the danger of material prejudice to a defendant is outweighed [***35] by their probative value and the photographs [**897] are not repetitive or cumulative in number." See, also, *Benner, supra*, and *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394.

In our view, the probative value of the photographs complained of far outweighed any prejudicial effect. Similar to our holding in *Jells, supra*, which was also tried before a three-judge panel, the outcome would not have been different here even if the gruesome photographs had not been introduced into evidence. The photographs in issue were relevant, however, to support the testimony of the expert witnesses during trial. In any event, since the introduction of such photographs did not constitute prejudicial error, we overrule defendant's seventeenth proposition of law.

In his eighteenth proposition of law, defendant asserts that he was denied a fair trial by prosecutorial misconduct during both the guilt and mitigation phase closing arguments. Specifically,

defendants cites fourteen instances of what he alleges to be improper prosecutorial comments.[4]

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[4] The instances of prosecutorial misconduct alleged by defendant are as follows:

> 1. "You know, back on September 10th, our community had a little boy, and we've had a lot of little boys in our community, but this 12-year old boy we have not talked about too much. We've dealt with him in an abstraction. He hasn't been here. And the Court is aware of the leaps and bounds and the rights of victims. I'm not trying to ignore the procedural rights of the defendants in cases, but sometimes we forget and don't pay attention when we talk about Constitutional Rights of the defendant, and we don't, in the balance -- how about Raymond Fife's right to live? How about his Constitutional Rights to be here today, to be in school, to celebrate his 13th birthday with his parents."
>
> 2. "The question that is to be determined by this Court is whether that man [indicating to the defendant] and his buddy, Timothy Combs, engaged in a criminal enterprise wherein he destroyed and devoured a little boy on the 10th day of September of 1985. * * * I can't imagine in my 10 years as being prosecutor that this could happen."
>
> 3. "Now, one witness that testified. Candyce Jenkins * * * describes the defendant as an 'animal.' The other one hatred."
>
> 4. "* * * [B]ut he [the defendant] followed him [Timothy Combs] back to the scene of the crime to look for evidence to destroy so they could cover up their heinous, unbelievable, animalistic behavior. He would make the Marquis deSade proud!"
>
> 5. "Now, we know on September 10th, 1985, the year of our Lord -- and I'm going to go through, as I view the evidence -- as Mr. Kontos and I see the facts to be and the truth to be."

6. "Maybe Mr. Lewis will argue that Raymond wasn't on the bike. It didn't have fingerprints. Well, there's an explanation, you don't necessarily have fingerprints on everything. And rain will affect fingerprints as it will affect blood."

7. "Who does this Court feel is more qualified? Mr. Dehus or Mr. Gelfius on the charcoal lighter as to paint thinner and hydrocarbons? I thought that his testimony was much more credible. I don't feel Mr. Dehus; it couldn't break down; very unlikely, and I don't think that's the case. I think that the witness from the Arson Lab who deals strictly with arson is the most credible witness in this case, and that substantiates the State's case."

8. "No one wants to testify against his brother, just like Morris Hill didn't want to testify against his nephew."

9. "Finally, Your Honors, to get this poor, dumb boy who really wouldn't do anything, who tried to sexually attack Mr. Melius, tried to put his mouth in the boy's penis, grabbed his penis, we know he did violently rape Mary Ann Brison in the same wooded area. Talked about how he talked hateful to her. We know what he did to Candyce Jenkins; had anal sex, oral sex, vaginal sex, once again, anal sex, had a knife and threatened to cut her vagina out; bit her on the breast. Seems to be his calling card; the bite. And when she screamed and yelled that it hurt, he said, 'Good! I want it to hurt.' And that's what this case is about. This case isn't just about a killing. This case is about an individual who thrives and relishes on inflicting pain and torture to other human beings."

10. "Raymond Fife was a 12-year-old boy; very active and vibrant, who was caught in the middle of a living hell caused by this defendant. Raymond Fife had no justice while he was living, but he demands justice now even in his absence, and justice demands, Your Honors, that you return a verdict of guilty. * * *"

11. "The reason that it is so clear is because the defense has not shown by or has not substantiated or brought

about any mitigating factors in this case, and it's very clear, aggravating circumstances, especially three of them, will clearly outweigh the absence of any mitigation."

12. "Well, I'd like to cite a few days that they weren't together: February 8th, 1984, when this defendant raped Mary Ann Brison. They weren't together March 3rd, 1984, when this defendant raped and brutalized Candyce Jenkins. They weren't together April 1984 through April 1985 when this defendant was incarcerated."

13. "In addition to that, he says he has difficulty with his motor skills between the right hand and left hand and he's not very good at that. He didn't have any problem grabbing women that I told you about before. Grabbing them with his left hand and the knife in the right hand while he sexually assaulted them."

14. "Now, there was a witness that the State would have wanted to present in this case, but unfortunately we could not call him. Raymond Fife. He would have been able to testify as to what happened that particular day. He would have been able to tell all of us, including this defendant, how he felt when he was abducted and helpless and felt doomed because he had no opportunity to escape. He would have been able to tell us what it felt like to be punched and continually kicked; what it felt like to be strangled so severely that he'd be gasping for breath. He'd be able to describe the pain involved and sexual molestation. He'd also be able to tell you and tell all of us what it would feel like -- the indescribable pain when your flesh is burning and you're helpless to do anything about it. And finally, he'd be able to tell us what it would be like to have a stick rammed up your rectal cavity so deeply and so severely that it perforates through the rectum and goes into the urinary bladder. But he's not here to testify about that thanks to this defendant.

"There's some other things that Raymond Fife can't come here and testify about either. He can't testify

[***36] [*330] [**898] In *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589, 23 O.O.3d 489, 493, 433 N.E.2d 561, 566, this court observed that "the prosecution is entitled to a certain degree of latitude in summation." Additionally, in *State v. White* (1968), 15 Ohio St.2d 146, 151, 44 O.O.2d 132, 136, 239 N.E.2d 65, 70, we noted that "[w]e indulge in the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." See, also, *Jells, supra*, and *Post, supra*.

A review of the instances cited by defendant indicates that no objections were raised when any of the complained-of comments were made, and therefore any error is deemed waived. *State v. Lott* (1990), 51 Ohio St.3d 160, 167, 555 N.E.2d 293, 301-302. In addition, we find that neither prejudicial error nor plain error as set forth in *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, is present in the context in which the comments by the prosecution were made. Accordingly, we find defendant's eighteenth proposition of law to be not well taken.

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about how he misses his family, about how he misses his friends in the Scout group, about how he'd like to be with his father in the backyard feeding the birds, how he'd like to be able to live and love and share his love with his family and friends, and he will never be able to do that because of this defendant; this manifestation of evil, this anomaly to mankind, this disgrace to mankind sitting at the end of that table took care of that! And the most commentary about the makeup of this defendant is the manner of the death of Raymond Fife."

Defendant, [***37] in his nineteenth proposition of law, cites seven instances in which he was denied a fair trial due to the ineffective assistance of counsel in that counsel failed: (1) to request hearings on all the pretrial motions that were filed; (2) to attempt to seat a jury before waiving the right to a jury trial; (3) to fully advise the defendant of his legal rights concerning his waiver of a jury trial so that he could voluntarily, knowingly and intelligently decide whether to waive the right; (4) to enter a continuing objection to a police officer's testimony of his belief that defendant was lying; (5) to timely file a motion for a new trial with a hearing; (6) to object to the state's improper [*331] closing argument; and (7) to preserve the record or otherwise object on any issue that this court or any future court deems waived by such omission.

In *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693, the high court established a two-prong analysis for determining whether ineffective assistance of counsel merits a reversal of a criminal conviction:

> "* * * First, the defendant must show that counsel's performance was deficient. This requires [***38] showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. * * *"

In applying the *Strickland* standard to the seven instances of ineffective assistance of counsel, and upon reviewing the instances both individually and collectively, we find no prejudice to defendant that compels [**899] a reversal of his conviction. Therefore, we overrule defendant's nineteenth proposition of law.

In his twentieth proposition of law, defendant asserts that "the trial court erred in entering a judgment of conviction for kidnapping and the other felonies where convictions on both offenses are contrary to R.C. 2941.25. Secondly, where an underlying felony count which is also used as a specification for aggravated murder merges, then it cannot be considered as an additional specification for sentencing purposes."

In the cause *sub judice*, defendant was convicted of kidnapping, rape, aggravated [***39] arson, felonious sexual penetration and aggravated murder.

R.C. 2941.25 provides as follows:

> "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may

> contain counts for all such offenses, and the defendant may be convicted of all of them."

In *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816, 817, this court summarized the many precedents involving R.C. 2941.25:

> "This court has set forth two-tiered test to determine whether two crimes with which a defendant is charged are allied offenses of similar import. In [*332] the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, [***40] the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses."

In *State v. Logan* (1979), 60 Ohio St.2d 126, 14 O.O.3d 373, 397 N.E.2d 1345, a case upon which defendant relies, this court found rape and kidnapping to be allied offenses of similar import. However, the *Logan* court also held that where murder is the underlying crime, a kidnapping in facilitation thereof would generally constitute a separately cognizable offense. *Id.* at 135, 14 O.O.3d at 379, 397 N.E.2d at 1352.

Similarly, in *State v. Powell* (1990), 49 Ohio St.3d 255, 262, 552 N.E.2d 191, 199, this court found

kidnapping and attempted rape not to be allied offenses of similar import.

In the instant cause, the record reflects that the kidnapping commenced near the parking lot of Valu-King. Defendant, along with Tim Combs, forcibly removed Raymond Fife from the path [***41] near the parking lot to a wooded area where they could not be seen. There, the victim was purposely and repeatedly beaten on the head and body. This does not appear to have been done for the immediate motive of rape, felonious penetration or aggravated arson, but to terrorize and inflict serious physical harm. See R.C. 2905.01(A)(3) (kidnapping).

Anal intercourse was also performed forcibly on the victim, which constitutes rape. In addition, the bite marks on the victim's penis indicate that fellatio was performed by defendant. A piece of wood was stuck into the victim's anus (felonious sexual penetration). The evidence also shows that the victim was strangled by his own underwear and set on fire (aggravated arson).

The foregoing scenario demonstrates that not only was there a separate immediate motive or animus, but that the acts were committed separately with the kidnapping continuing after the rape.

Based on the facts and evidence set forth in the record, as well as *Logan, supra*, we hold that the crimes upon which defendant [**900] was convicted were not allied offenses of similar import and the trial panel did not err in considering the specifications for sentencing purposes. [***42] Accordingly, we find defendant's twentieth proposition of law to be without merit.

[*333] In his twenty-first proposition of law, defendant argues that his constitutional rights were violated when the trial panel denied his motion for a new trial without a hearing.

Crim.R. 33 allows a trial court to entertain a motion for a new trial, and "[t]he allowance of a motion for a new trial on the grounds of newly discovered evidence is within the competence and discretion of the trial judge; and in the absence of a clear showing of abuse such decision will not be disturbed." *State v. Williams* (1975), 43 Ohio St.2d 88, 72 O.O.2d 49, 330 N.E.2d 891, paragraph two of the syllabus.

A review of the record reveals that the only newly discovered evidence proffered by defendant at the time of his motion was the affidavit of his brother, Raymond Vaughn, who recanted his sworn testimony that he had seen defendant washing blood out of pants. In our opinion, even with the recantation affidavit, the result of the defendant's trial would not have been different. See *State v. Duling* (1970), 21 Ohio St.2d 13, 50 O.O.2d 40, 254 N.E.2d 670.

Since we find no abuse of discretion by the [***43] trial court in this vein, we overrule defendant's twenty-first proposition of law.

In his twenty-second proposition of law, defendant essentially contends that Ohio's statutory framework for imposition of capital punishment creates a mandatory sentencing scheme in contravention to both the state and federal Constitutions.

We find defendant's argument in this vein to be not well taken. As this court noted in *State v.*

Jenkins (1984), 15 Ohio St.3d 164, 174, 15 OBR 311, 320, 473 N.E.2d 264, 277: "[t]he system currently in place in Ohio does require the sentencing authority to focus on the particular nature of the crime as well as allow the accused to present a broad range of specified and nonspecified factors in mitigation of the imposition of the death sentence."

In addition, this court upheld the statutory framework assailed by defendant in *State v. Buell* (1986), 22 Ohio St.3d 124, 22 OBR 203, 489 N.E.2d 795. Accordingly, we reject defendant's twenty-second proposition of law.

In his twenty-third proposition of law, defendant argues that the trial panel failed to consider all of the evidence in support of mitigation during the penalty phase, and thus violated R.C. 2929.03(F) [***44] and the Eighth and Fourteenth Amendments to the United States Constitution.

Our careful review of the sentencing opinion, however, convinces us that the trial court did in fact consider all mitigating factors presented by defendant, and articulated the reason each was outweighed by the aggravating circumstances beyond a reasonable doubt. Thus, we hold that the trial court [*334] complied with the dictates of R.C. 2929.03(F). See *State v. Steffen* (1987), 31 Ohio St.3d 111, 118, 31 OBR 273, 279, 509 N.E.2d 383, 391. Therefore, we overrule defendant's twenty-third proposition of law.

In his twenty-fourth proposition of law, defendant contends that the death penalty scheme established in R.C. 2903.01 and 2929.02 *et seq.* violates the United States and Ohio Constitutions both facially and as applied to defendant.

The specific claims of unconstitutionality by defendant have been rejected by this court in numerous cases. See, *e.g.*, *Jenkins*, *Buell*, and *Lott*, *supra*. Accordingly, we reaffirm the constitutionality of Ohio's death penalty scheme both facially and as applied to defendant, especially since defendant proffers no compelling reason as to why the death penalty [***45] scheme is unconstitutional as applied to him. Therefore, we overrule defendant's twenty-fourth proposition of law.

In his twenty-fifth and final proposition of law, defendant argues that this court cannot find him guilty of aggravated murder, or find that the death sentence is proportionate and appropriate, under the independent [**901] appellate review required by R.C. 2929.05(A).

As has been set forth in the factual recitation above, and as will be seen in this court's independent review of the defendant's guilt and death sentence, the conviction rendered by the trial panel was supported by sufficient evidence and the death sentence is both proportionate and appropriate. Thus, we reject defendant's final proposition of law.

Having reviewed the various propositions of law raised by defendant, and having found none of them to be meritorious, we next turn to our responsibility of independently weighing the aggravating circumstances against the mitigating factors of the case.

In so doing, we review the testimony in the record, and note first that defendant's mother, Vera Williams, testified that all of her children were "slow" and that defendant's father never lived with

the family. In [***46] sum, defendant had a poor family environment.

Dr. Douglas Darnall, a psychologist, testified that defendant had an I.Q. of 55 and that his intelligence level according to testing fluctuates between mild retarded and borderline intellectual functioning, and that he is of limited intellectual ability. Dr. Darnall did state, however, that defendant was able to intellectually understand right from wrong.

Dr. Nancy Schmidtgoessling, a clinical psychologist, testified that defendant had a full scale I.Q. of 68, which is in the mild range of mental retardation, and that the defendant's mother was also mildly retarded. Dr. Schmidtgoessling [*335] also testified that defendant's moral development level was "primitive," a level at which "one do[es] things based on whether you think you'll get caught or whether it feels good. [T]hat's essentially whereabout [*sic*] a 2-year old is."

Dr. Douglas Crush, another psychologist, testified that defendant had a fullscale I.Q. of 64, and that his upper level cortical functioning indicated very poor efficiency.

Other mitigation testimony on behalf of defendant indicated that he was a follower and not a leader, who had to be placed in [***47] group homes during his youth.

Defendant also gave an unsworn statement to the trial court, in which he stated that he was sorry what happened, and that he didn't want to die. Defendant then started to cry.

With respect to the enumerated mitigating factors set forth in R.C. 2929.04, we find that defendant's

mental retardation is a possible mitigating factor. See *Penry v. Lynaugh* (1989), 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256. However, as the *Penry* court noted, there are various levels of mental retardation, and a person must be viewed individually as to the degree of retardation.

Upon a careful review of the expert testimony proffered with respect to defendant's mental retardation, we find a very tenuous relationship between the acts he committed and his level of mental retardation. As several of the experts pointed out, defendant did not suffer from any psychosis, and he knew right from wrong.

Defendant's relative youth, *i.e.*, eighteen years old at the time of the murder, is entitled to some weight. However, we believe this mitigating factor is clearly outweighed by the aggravating circumstances of the case. In addition, defendant's poor family environment, [***48] even if considered in mitigation, in no way outweighs the aggravating circumstances.

When considering the manner in which the victim was kidnapped and killed; the rape, burning, strangulation and torture the victim endured; and the total brutalization that took place, we find that these aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

Finally, this court must decide whether the sentence of death imposed here is excessive or disproportionate to the sentences in similar cases. We hold that the death sentence here is neither excessive nor disproportionate to the sentences approved for kidnapping/rape/murder in [**902] *State v. Durr* (1991), 58 Ohio St.3d 86, 568 N.E.2d

674; *Benner*, *Steffen*, and *Apanovitch*, *supra*. Accordingly, the penalty imposed here is appropriate.

[*336] In conclusion, we first find that there is no merit to any of the specific propositions of law raised by defendant that would compel a reversal of his convictions of the crimes described. Second, we find that the aggravating circumstances outweigh the mitigating factors presented, beyond a reasonable doubt. Third, we find the evidence sufficient to support the conviction, [***49] and the sentence of death appropriate in this case, as it is neither excessive nor disproportionate to the penalty imposed in similar cases. Therefore, in accordance with R.C. 2929.05(A), we affirm the conviction and sentence of death in this cause.

Accordingly, the judgment of the court of appeals is hereby affirmed.

Judgment affirmed.

Moyer, C.J., Holmes, Douglas, Wright, H. Brown and Resnick, JJ., concur.

APPENDIX J

STATE v. HILL

Court of Appeals of Ohio,
Eleventh Appellate District,
Trumbull County

November 27, 1989, Decided

Case Nos. 3720, 3745

COUNSEL: Atty. Dennis Watkins, County Prosecutor, Atty. Peter Kontos, Assistant Prosecutor, Warren, Ohio, For Plaintiff-Appellee.

Atty. Roger Warner, Columbus, Ohio, For Defendant-Appellant.

JUDGES: Hon. Judith A. Christley, P.J., Hon. Joseph E. Mahoney, J., Hon. Donald R. Ford, J., concur

OPINION BY: FORD

OPINION

DONALE R. FORD, J.

On September 10, 1985, at approximately 5:15 p.m., Raymond Fife, age twelve, left the home of his parent in Warren, Ohio to visit his friend, Billy Simmons. He was to return home by 6:30 p.m. to attend a scout meeting. The victim decided to take a shortcut through a large field which was overgrown

with thick woods, dense brush and trees and was located behind the nearby Value King. This area, which was crisscrossed by numerous dirt paths, was used by local residents as a shortcut between streets and as an area in which to ride bicycles.

At 5:50 p.m., Billy Simmons telephoned the victim's parents to ask why Raymond had not arrived. Concerned, the Fifes, along with some relatives and friends, began to search for Raymond. About three hours later, Raymond's father found [*2] him in the field directly behind the supermarket. At the time has was found, Raymond was alive, but unconscious. His body was nude, except that his shoes and socks were still on his feet, and his underwear had been tied around his neck. Two days later, Raymond died from the injuries he sustained on the evening of September 10.

The autopsy report revealed multiple injuries. In addition to numerous bruises and abrasions on his arms, neck, and upper torso, the victim has sustained second and third degree burns on his face, neck and shoulders. There was a ligature mark around the neck, indicating that the victim had been choked. Examination of the skull revealed a subdural hemorrhage, suggesting that the victim had sustained severe blows to the head. Inspection of the lower body disclosed teeth marks on his penis and substantial damage to the anus. The victim's rectum and urinary bladder had been perforated.

On September 12, 1985, appellant, Danny Lee Hill, voluntarily went to the police station and inquired about a reward offered for information regarding the Fife homicide. Appellant spoke with Sergeant Stewart, who was not then actively

involved in the investigation. However, Stewart [*3] made note of appellant's conversation. It was later discovered that appellant's statement contained knowledge of facts which had not been made available to the general public.

The next day, after reading Stewart's note regarding the conversation with appellant, Sergeant Steinbeck, who was directly involved with the investigation, went to the appellant's residence. (Steinbeck, a detective in the juvenile division, became involved in the case when he was asked to take a missing person's report from the victim's parents. After the victim's death, he remained active in the investigation.) Appellant voluntarily accompanied Sergeant Steinbeck to the police station where he received a rights statement, executed a waiver of his rights, and was again interviewed. During the questioning, appellant offered an alibi. Appellant's mother arrived at the station later and corroborated his statement. This statement was typed by Steinbeck; but appellant, before signing it, departed with his mother.

Over the course of the weekend, the police investigation uncovered additional information which tended to refute the appellant's alibi. On Monday, September 16, 1985, Steinbeck, accompanied by Detective [*4] Morris Hill, appellant's uncle, traveled to appellant's abode to request that he go to the police station to sign the September 13 statement. The officers also asked appellant's mother to accompany them to police headquarters to give a written statement detailing her corroboration of his alibi. At the prompting of his mother, appellant consented to the request.

Appellant was advised of his *Miranda* rights upon his arrival at the station.

After receiving his rights, appellant signed the typewritten form of the statement he made on September 13. Appellant was questioned by Officers Hill, Steinbeck and Stewart about the extent of his participation with the murder. Appellant denied any involvement. Finally, Detective Hill stated categorically that he believed appellant had been involved in the homicide. The detective suggested to the appellant that the two of them talk privately. Detective Hill testified that, during the private conversation, he urged appellant to tell the truth. At that point, appellant informed Hill that he had been present during the murder of Raymond Fife. The other officers returned to the interrogation room, and appellant was asked to give a statement to the [*5] police.

Appellant's statements were recorded on audio and video tape. Although appellant admitted being present during the perpetration of the offenses, he denied having any involvement. Instead, he implicated Timothy Combs. (Combs was subsequently charged and convicted as a co-principal. His conviction was affirmed by this court in *State v. Combs* [Dec. 2, 1988], Portage App. No. 1725, unreported, and is presently pending before the Ohio Supreme Court). Appellant stated that Combs had inserted "a stick, like a broom handle," into the victim's rectum. Appellant was re-advised of his constitutional rights during the audio taping and before the video recording session. He executed a waiver after each of these statements of rights.

Appellant was indicted for kidnapping, rape, aggravated arson, felonious sexual penetration, aggravated robbery and aggravated murder with specifications on September 17, 1985.

Between the date of the indictment on September 17 and December 11, appellant filed a number of motions, including: motions to suppress, for closure, for discovery, for an appointment of an expert, for change of venue, to include licensed drivers in the pool of prospective jurors, [*6] to insulate, motion for individual sequestered voir dire, and motion to prohibit death qualification for the venire. On December 16, 1985, a pretrial suppression hearing was held on appellant's motion to suppress statements he made to law enforcement officers on September 12, 13 and 16, 1985.

On January 7, 1986, appellant appeared before the court and executed a waiver of his rights to a jury trial. Prior to executing this waiver, the trial court informed appellant that objections that appellant had to the manner in which juries had been selected would "in all probability" be overruled. Appellant waived his right to a jury trial cognizant of the trial court's intentions with respect to the pending motions. Immediately following appellant's waiver, the motions were overruled.

The trial began on January 21, 1986 and was heard by a three judge panel. At trial, a number of witnesses testified, including one who had seen appellant walking in the field and throwing a stick into the brush; two who had observed the co-defendant standing near the path at the same time that they heard a scream of twenty to thirty seconds; one who saw appellant washing a red substance from

his pants some time [*7] after the assault; a pathologist who indicated the stick fit the area of penetration like a "key in a lock;" a criminalist who could not find blood on appellant's pants or the stick; two females who had been sexually assaulted by appellant; two males who had been sexually solicited by him; and a forensic odontologist who, based upon some unique characteristics of appellant's teeth, concluded that appellant inflicted the bite marks on the victim's penis.

Appellant presented a number of witnesses including those who were familiar with appellant's low level of intelligence, and a forensic odontologist who found that the dental evidence was generally inconclusive to show that appellant had made the bite marks on the victim's penis. However, based on defendant's exhibit "L", he did testify by way of qualification, as to one distinctive bite mark that: "What I'm saying is either Hill or Combs, both, could have left some of the marks, but the one mark that's consistent with the particular area most likely was left by Hill."

Other items admitted into evidence were the stick, the tape recorded conversation, the video tapes, and multiple photographs.

After hearing the evidence and deliberating [*8] for five hours, the court unanimously found appellant guilty on all counts, except aggravated robbery.

Pursuant to the dictates of R.C. 2929.04(B), a mitigation hearing began on February 26, 1986, before the judicial tribune. Again, after hearing the testimony and arguments, and weighing the aggravating circumstances against the mitigating factors, the court sentenced appellant to ten to

twenty five years for both aggravated arson and kidnapping, life imprisonment for rape and felonious sexual penetration, and death for aggravated murder with specifications.

Appellant has appealed that decision raising the following nineteen assignments of error.

ASSIGNMENT # 1

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE STATEMENTS OF THE APPELLANT.

ASSIGNMENT # 7

THE TRIAL COURT ERRED IN ALLOWING THE APPELLANT TO WAIVE HIS RIGHT TO JURY IN WRITING PURSUANT TO CRIM. R. 23.

Appellant's assignments of error one and seven address substantially similar issues of law and will therefore be discussed concurrently. Both assignments present the issues of the validity of the waiver of appellant's constitutional rights to counsel, to remain silent, and to a jury trial, predicated upon the appellant's [*9] mental capacity and illiteracy.

Although not expressly argued by appellant, these assignments contain, as a subtext, the contention that, given appellant's mental retardation and inability to understand these legal proceedings, the sentence rendered in this case constitutes cruel and unusual punishment and is therefore violative of the Eighth Amendment to the United States Constitution. This argument was extensively addressed in the recent landmark United States

Supreme Court case of *Penry v. Lynaugh* (June 26, 1989), 492 U.S. __, 106 L. Ed. 2d 256, in which the Supreme Court upheld the constitutionality of the death penalty sentence given to petitioner, John Paul Penry, (although remanding for failure to consider mitigation evidence).

Petitioner, in *Penry, supra,* had been diagnosed as mildly to moderately retarded and was described as having the mental age of a six and one-half year old. (By contrast, appellant has been diagnosed as having anywhere from a fifty-five to seventy-one full scale I.Q., which would cause him to be characterized as mildly to moderately retarded. The record does not indicate that a finding was made as to appellant's mental age, although [*10] some reference was made in evidence on this subject indicating a mental age of seven to nine years.) Petitioner Penry was charged with capital murder and found competent to stand trial. (As used in this context, competency means that petitioner was able to have a rational understanding of the proceedings against him and was able to participate in the preparation of his own defense. See, *e.g., Dusky v. United States* (1960), 362 U.S. 402.)

Despite this finding of competency, petitioner argued that his reduced reasoning abilities made the potential death sentence disproportionate to his personal culpability. "In essence, Penry argue[d] that because of his diminished ability to control his impulses, to think in long-range terms, and to learn from his mistakes, he was not capable of acting with the degree of culpability that can justify the ultimate penalty." *Penry,* 492 U.S. __, 106 L. Ed. 2d at 290-91, citing *Thompson v. Oklahoma* (1988), 487 U.S. __,

101 L. Ed. 2d 702. After consideration of the mitigating factors permitted under Texas law, the trial court found petitioner guilty and sentenced him to death.

Petitioner's sentence was ultimately appealed to [*11] the United States Supreme Court. He argued that the imposition of a death sentence on someone with limited mental capabilities violated the "evolving standards of decency that mark the progress of a maturing society" and would therefore be unconstitutional under the Eighth Amendment. *Penry*, 492 U.S. __, 106 L. Ed. 2d at 288. See, also, *Trop v. Dulles* (1958), 356 U.S. 86, 101. Petitioner further argued that the execution of a mentally retarded person was cruel and in unusual punishment because it was "disproportionate to his degree of personal culpability." *Penry*, 492 U.S. __, 106 L. Ed. 2d at 289.

The Court, in response, stated that courts have long been opposed to utilizing the concept of mental age as a basis for relieving a defendant from criminal responsibility. *Penry*, 492 U.S. __, 106 L. Ed. 2d at 292. The Court noted that a finding of a lack of capability, based on the diminished mental age of a party, would disenfranchise the mildly retarded from a right to contract or a right to marry. In *Penry*, the Court concluded:

"* * * [M]ental retardation is a factor that may well lessen a defendant's culpability for a capital offense. But we cannot [*12] conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by virtue of their mental retardation alone." *Ibid.*

As long as the court takes into consideration mitigating evidence of mental retardation, and the court addresses each case on an individualized basis, it is not cruel and unusual to impose a sentence of death on a convicted perpetrator who is mentally retarded. *Penry* was ultimately remanded for resentencing, as Texas law did not permit the consideration of petitioner's mitigating evidence. (*Penry* addresses only cases in which the perpetrator is borderline or mildly mentally retarded. The United States Supreme Court in *Penry*, and this court here, offer no opinion as to the constitutionality of executing an offender whose handicap is more severe.)

The individualized basis mandated by the United States Supreme Court, in determining the constitutionality of the imposition of the death penalty on mentally retarded persons, also serves as the basis of analysis for determining the sufficiency of the waiver of constitutional rights by one who is mentally retarded.

In [*13] the first sub-agreement of appellant's first assignment of error (there are seven sub-arguments in all), appellant challenges the validity of his waiver of his Sixth Amendment right to counsel. Appellant argues that his Sixth Amendment rights were violated because he could not "knowingly" and "intelligently" waive his rights, due to him being essentially illiterate and mentally retarded.

The standard used to assess the validity of the appellant's waiver of his Sixth Amendment rights was enunciated in *Johnson v. Zerbst* (1938), 304 U.S. 458, 464, which stated that "[t]he determination of

whether there has been an intelligent waiver * * * must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Subsequent decisions of the United States Supreme Court have focused on the separate nature of the "voluntary" and "knowing and intelligent" aspects of the accused's waiver. The court is required to make "discrete inquiries" into both the voluntariness of the waiver and the question of whether the waiver was "knowingly and intelligently" made. *Edwards v. Arizona* (1981), 451 U.S. [*14] 477, 484; *Schneckloth v. Bustamonte* (1973), 412 U.S. 218; *Miranda v. Arizona* (1966), 384 U.S. 436.

There is little doubt that lack of mental acuity, or mental illness, can interfere with an accused's ability to give a knowing and intelligent waiver of his Sixth Amendment right to counsel. However, "[t]his is not a field for inflexible rules" delineating the bright line that distinguishes those capable of an intelligent waiver from those who lack the ability to do so. *Miller v. Dugger* (C.A. 11, 1988), 838 F.2d 1530, 1539, citing *North Carolina v. Butler* (1979), 441 U.S. 369, 375. This court is aware that an accused who cannot comprehend his rights, cannot waive them intelligently. *Miller, supra.* (See *e.g., Fare v. Michael C.*, 442 U.S. 707, 725 [youth and inexperience militating against intelligent waiver]; *Cooper v. Griffin* (C.A. 5, 1972), 455 F. 2d 1142, 1145 [mental retardation]; *United States v. Short* (C.A. 6, 1986), 790 F. 2d 464, 469 [language difficulties]).

This does not mean, however, that an accused's mental condition, by itself, will universally prevent

the accused from ever effectively waiving a constitutional [*15] right. See, *e.g.*, *Colorado v. Connelly* (1986), 479 U.S. 157. If, under the facts and circumstances present in this case, the court can determine that the defendant made a "knowing and intelligent waiver," the waiver will stand.

This court has recently considered the issue of whether a person with diminished mental capacity could "knowingly and intelligently" waive his rights in *State v. Mitzel* (Sept. 22, 1989), Trumbull App. No. 3917, unreported. *Mitzel, supra*, cites with approval *State v. Nichols* (1965), 3 Ohio App. 2d 182, which states that "subnormal mentality" may be considered in determining whether the confession was "knowingly" and "intelligently" made, but that diminished I.Q. will not, in and of itself, negate the waiver and preclude admission. Examination of all the facts and circumstances in *Mitzel* revealed that the defendant was sufficiently aware of the time, space, geography and environment of his confession, as well as the fact that the persons to whom he was confessing were policemen. The defendant-appellant there was found to be capable of making a "knowing" and "intelligent" waiver of his rights because the totality of the circumstances [*16] examined (including the videotaped confession) indicated that defendant-appellant had sufficient understanding to execute a valid waiver, even given the fact that he was of diminished mental capacity.

Appellant, in the case at bar, admittedly suffers from some mental retardation (although the evidence presented is divergent as to the severity of the handicap) and has had concomitant difficulties in language comprehension throughout his formal

education. Appellant is categorized as being mildly to moderately retarded. Evidence was presented which indicates that appellant is illiterate and this court acknowledges that literal recognition of each word contained in the "*Miranda* Rights" and/or "waiver form" may be beyond appellant's mental comprehensive capacity.

However, from the record here, particularly during the suppression hearing, this court is also aware (as was the trial court below) of the long and multi-faceted exposure appellant has had with the state's criminal justice system. The evidential table in this case also demonstrates that appellant exhibited a functional capacity to understand these rights, including the right to appointed counsel. This was evidence from the [*17] exchange that occurred during the audio and video taped sessions. The officers who interrogated appellant had either significant contact with him and/or had questioned him on prior occasions and had developed informed estimates as to appellant's ability to understand, albeit in a vernacular sense, all aspects of the *Miranda* warning. The audio and video tapes of appellant's interrogations disclose that appellant was capable of understanding the questions put to him and of responding intelligently.

Moreover, the behavior of the appellant during the police investigation belies the notion that he was no more than a malleable victim of police suggestion. Appellant possessed the requisite intelligence to implicate other persons in the murder and was capable of modifying his story when inconsistencies were demonstrated to him. Additionally, appellant qualified and corrected the police officers's

misstatements of the factual scenario which he had related to them. He also was able to follow "verbal concepting," displaying a understanding of the officers direction of questioning and the dialogue utilized during the interrogation.

In determining the existence of any waiver, appellee carries [*18] the burden of proving that the waiver was knowing and intelligent. (*Miranda, supra*) and voluntary (*Lego v. Twomey* [1972], 404 U.S. 477), by a preponderance of the evidence. See, *Miranda*. Once the trial court, as the trier of fact, has determined that the state has carried its burden, the decision will not be overruled unless found to be against the manifest weight of the evidence. Appellant has not demonstrated that the trial court's decision, specifically, that the waiver was knowingly and intelligently made, was against the manifest weight of the evidence and, consequently, his first argument is without merit.

Appellant next contends that, as a result of his mental affirmities and the coercive action of the police, his waiver of his constitutional right was not voluntary. Appellant states that "*any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law * * *." *Mincey v. Arizona* (1977), 437 U.S. 385, 398. Appellee directs this court's attention to a number of cases, from various jurisdictions, which provide that low intelligence of the confessor does not necessarily exclude statements voluntarily made to [*19] police. See, *e.g., State v. Sisneros* (1968), 79 N.M. 600, 446 P. 2d 875; *United States v. Glover* (C.A. 9, 1979), 596 F. 2d 857. *Glover, supra,* cites *United States v. Young* (E.D. Pa., 1973), 355 F. Supp. 103, a case which is

similar to that sub judice. *Young, supra,* considered the question of whether a defendant with an I.Q. of fifty-seven could voluntarily waive his *Miranda* rights. The court determined that he could do so, relying extensively on the defendant's "extensive dealings with the criminal process." *Id.* at 111.

Ohio law has noted that a waiver of *Miranda* rights is only valid when it is intelligent, knowing and voluntary. (See *e.g., State v. Scott* (1980), 61 Ohio St. 2d 155) and states that failure to prove these elements by a preponderance of the evidence is a violation of due process. *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 231.

In *Jenkins, supra,* the Ohio Supreme Court, confronted with a scenario similar to the case at bar, was obligated to determine the voluntariness of a mentally retarded accused's waiver of his *Miranda* rights. The court noted that, although the police officers were not medical [*20] experts, they were able to observe and converse with the accused. "While the explanation of rights and their waiver must be weighed with the individual's * * * mental capacity, the totality of the evidence (including the police observations) supports the trial court's judgment to admit the statement in this case." *Id.* at 233.

This court is further cognizant of the United States Supreme Court's decision in *Connelly, supra,* which substantially limited the areas in which a court can examine the voluntariness of the waiver and subsequent statement. "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth

Amendment; it goes no further than that." *Connelly*, at 170.

In *Connelly*, the United States Supreme Court was confronted with the claim of defendant-respondent that his mental illness compelled him to confess to the murder of a girl. Defendant-respondent was a chronic schizophrenic who believed that the "voice of God" had compelled him to confess. Defendant-respondent argued that his mental condition interfered with his volitional ability and kept him from rendering a rational decision. The Court did not accept [*21] defendant-respondent's contentions, holding instead that "coercive police activity (was) a necessary predicate to the finding that a confession (was) not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Connelly*, at 167. As the police did not, in any way, coerce the statement, the Court said that the statement was voluntarily given, and that the mental state of the confessor was immaterial for a determination of voluntariness.

As this court stated in addressing appellant's first argument, the evidence adduced indicates that appellant had the requisite intelligence to "knowingly, voluntarily and intellengently" waive his *Miranda* rights, rights to which he had been exposed numerous times. Moreover, the evidence does not demonstrate any inappropriate coercion being applies to appellant beyond some suggestive interrogations advanced by the officers in the statement sessions. Appellant's second argument is without merit.

Appellant next states that his statements were taken in violation of the dictates of *Miranda*. This

argument essentially reiterates contentions voiced in appellant's first two arguments. The crux of appellant's position [*22] can be seen in *Moran v. Burbine* (1986), 475 U.S. 412, 421, which states:

> "The inquiry has two distinct dimensions. *Edwards v. Arizona, supra*, at 482, 68 L.Ed. 2d 378, 101 S.Ct. 1880; *Brewer v. Williams*, 430 U.S. 387, 404, 51 L.Ed. 2d 424, 97 S.Ct. 1232 (1977). First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. *Fare v. Michael C.*, 442 US 707, 725, 61 L.Ed. 2d 197, 99 S.Ct. 2560 (1979). See also *North Carolina v. Butler*, 441 U.S. 369, 374-375, 60 L.Ed. 2d 286, 99 S.Ct. 1755 (1979)."

Appellant argues that not only did he not possess this requisite awareness, but the police took advantage of this lack of mental acumen by applying several psychological [*23] ploys.

Appellee argues that appellant received his *Miranda* rights on at least four occasions over a four-day period and, as evidenced by the audio and video tape, appeared articulate and coherent as he answered questions. Moreover, the State refers to a

multiplicity of cases which allow the admissibility of the statements when rendered hours or even days after *Miranda* rights were administered. See, *e.g.*, *United States, ex rel. Henne v. Fike* (7th Cir., 1977), 563 F. 2d 809; *State v. Gilreath* (Ariz., 1971), 107 Ariz. 318, 487 P. 2d 385, *cert. denied*, 406 U.S. 921, (1972).

This court finds, after examination of the evidence, that appellant was able to "knowingly, intelligently, and voluntarily" waive his *Miranda* rights and, in fact, did so. While, as *Mitzel* notes, a more thorough explication of appellant's understanding of the concepts embodied in *Miranda* would make our determination unequivocal, the officers present at the investigation appeared to ascertain the adequate quality of appellant's understanding of his rights. (This is particularly true where, as in this case, the officers had *Mirandized* the appellant on several previous occasions; [*24] and where appellant was apparently able to knowingly, voluntarily and intelligently waive his *Miranda* rights on each prior occasion. The record reveals that appellant's frequent brushes with the legal system include convictions for the rape of two women in 1984. Further, Detective Hill testified that appellant had been arrested fifteen to twenty times and that he had personally administered *Miranda* rights to appellant four or five times.) Appellant's third argument is without merit.

In his fourth sub-argument under the first assignment of error, appellant contends that his Fourth and Fourteenth Amendment rights were violated when he was "seized from his home and placed into custodial interrogation without probable

cause, proper judicial authorization, or his consent." Appellant argues correctly that the administration of *Miranda* rights will not cure a Fourth Amendment violation. "[A]lthough a confession after proper *Miranda* warnings may be found 'voluntary' for purposes of the Fifth Amendment, this type of 'voluntariness' is merely a 'threshhold requirement' for Fourth Amendment analysis." *Dunaway v. New York* (1979), 442 U.S. 200, 216. See, also, *State* [*25] *v. Fickes* (Mar. 29, 1985), Trumbull App. No. 3418, unreported (concurring opinion).

The United States Supreme Court has consistently held that custodial interrogations, conducted without probable cause, constitute violations of the accused's Fourth and Fourteenth Amendment rights. *Dunaway, supra.* The state may not, without probable cause, judicial authorization or consent, bring an accused to the police station for fingerprinting or for questioning. *Davis v. Mississippi* (1969), 394 U.S. 721; *Brown v. Illinois* (1975), 422 U.S. 590; *Hayes v. Florida* (1985), 470 U.S. 811. Nor will the police be able to shield an improper "seizure" under the "good faith" exception announced in *United States v. Leon* (1984), 468 U.S. 897; *Fickes, supra.*

This court finds that the record of this case is devoid of evidence indicating that the custodial interrogation of appellant violated his constitutional rights. When appellant first traveled to the Warren Police Department on September 12, 1985, he did not voluntarily and without prompting from anyone, police authority or otherwise. Appellant's reason for this visit was ostensibly to collect a reward (of which he [*26] had hear rumors) by implicating other

persons in the attack of the victim. Appellant even accompanied Sergeant Stewart of the Warren police in an attempt to find the victim's bicycle.

Appellant returned to the police station the following day at the request of Sergeant Steinbeck. Steinbeck had read the note, left by Stewart (after his original meeting with appellant), which stated that appellant was aware of some of the facts of the homicide. Steinbeck went to appellant's home and asked if appellant would accompany him to the station to answer further questions. Appellant agreed. Although appellant was not under arrest, he was given his *Miranda* rights by Steinbeck.

Steinbeck prepared a written statement, based on the questioning conducted with appellant. However, he neglected to have appellant sign the statement on that day. Instead, appellant (who was free to leave throughout the interrogation) left the police station with his mother. Steinbeck, along with Detective Morris Hill, went to appellant's home on Monday, September 16, for the avowed purpose of getting appellant to accompany them to the station to sign the written statement and to obtain a formal statement from his [*27] mother regarding his alibi. The evidence is divergent as to the extent of appellant's initial voluntariness to return to the police station. There is some testimony that appellant became mildly recalcitrant to the idea of returning to the police station, only to change his mind at his mother's behest, and agreed to accompany the officers. On this point, there was sufficient evidence before the trial court, in its role of determining credibility, from which it could conclude

that the appellant was not inappropriately coerced in accompanying the officer to the state again.

It is not necessary for this court to determine whether appellant "consented" to the final custodial interrogation as it appears from the evidence that the police had probable cause to interrogate the appellant on September 16. Probable cause is found, in the context of custodial interrogations, when the focus of the inquiry narrows itself sufficiently to the suspect being questioned. In this case, appellant provided some of the basis for probable cause in his initial conversation with Stewart, when he divulged information which was not known to the general public. Over the next three days, the Warren police received [*28] further information from appellant which focused suspicion on him. The police also spoke with witnesses who stated that appellant was around the scene of the crime at the time the murder had taken place.

Examination of the record reveals that all questioning of appellant occurred either with his consent and/or after the police had established probable cause to question him. Consequently, the interrogation of appellant satisfies the tests set forth in *Hayes* and *Dunaway*, *supra*.

Appellant also alleges, in both the third and fourth sub-arguments to his first assignment of error, that the police improperly coerced him into confessing by means of psychological ploys. Appellant specifically refers to language used during the interrogations, such as simplistic juvenile or infantile terminology and obscenities, which allegedly underscores his mental retardation and suggestability. Appellant also states that the police

coerced a confession by threatening to use the statements of Timothy Combs as a means of showing that appellant had committed the crime.

Appellant's arguments are without merit. It seems ironic that, after contesting his ability to knowingly waive his constitutional [*29] rights, appellant would not object to the simplicity of the language used to question him. The recorded conversations alluded to by appellant do not suggest the use of any improprieties by the police. Appellant's allegations as to threats purportedly made by police as to the use of Combs' statements are similar to those raised, and rejected, in *State v. Jackson* (1977), 50 Ohio St. 2d 253, 256. Appellant's fourth argument is without merit.

Appellant's fifth sub-argument of the first assignment of error asserts that appellant was denied due process of law when he was denied his statutory right to counsel. Appellant premises his argument upon R.C. 120.16(F) which states: "Information as to the right to legal representation by the county public defender or assigned counsel shall be afforded to an accused person immediately upon arrest, when brought before a magistrate, or when formally charged, whichever occurs first." Appellant argues that he was not specifically informed of the right to a public defender and therefore was denied due process.

The argument put forth by appellant has been considered by the Fourth Appellate District in *State v. Semenchuk* (Mar. 10, 1982), [*30] Athens App. No. 1036, unreported. In *Semenchuk, supra,* the appellant made a similar claim that the county public defender was not specifically mentioned when

the appellant was given his *Miranda* rights. The Fourth Appellate District held:

> "Rather obviously, compliance with the dictates of Miranda (sic) does not *specifically* inform a defendant of the availability of the county public defender as mandated by R.C. 120.16(F). Even so, we conclude such failure does not require exclusion of the confession for the reason that the exclusionary roles under the federal constitution are applicable in Ohio only to violations of constitutional rights. A default in state law alone is not a ground for exclusion of material evidence. See *Kettering v. Hollen* (1980), 64 Ohio St. 2d 232; *State v. Meyers* (1971), 26 Ohio St. 2d 190." *Semenchuk*, at 8. (Emphasis in original.)

Appellant further asserts that his right to counsel was denied when Detective Hill told appellant's mother that there was no need to hire an attorney, as a public defender would be appointed during the trial. Appellant argues that, but for the detective's statements, appellant's mother would have hired [*31] an attorney and, appellant would have been represented during the September 16, 1985 interrogation.

Appellant's arguments are reminiscent of those propounded by respondent in *Moran, supra.* In *Moran,* respondent was in custody and had waived his *Miranda* rights. Concurrent with petitioner's waiver, his attorney telephoned the police station and inquired as to the whereabouts of her client. The police did not tell counsel that respondent would be questioned that night and, further, did not tell respondent that counsel had been appointed for him.

The United States Supreme Court held that "[e]vents occurring outside the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. * * * [T]he state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights." *Id.* at 422-423.

The rationale express in *Moran* is equally applicable to the case *sub judice.* Appellant was not aware of his mother's inquiries as to the need for an attorney. The propriety, or lack thereof, of Detective Hill's answer to [*32] appellant's mother (his sister) are irrelevant to the issue of whether appellant gave a knowing, voluntary and intelligent waiver of his *Miranda* rights. Since, as discussed above, this court has determined that appellant did adequately waive his rights, the fifth argument is without merit.

In the sixth sub-argument of his first assignment, appellant argues that his recorded statements (both audio and video) should have been suppressed, as this evidence was obtained without compliance with R.C. 2935.05. The statute in question reads as follows:

> "When a person named in section 2935.03 of the Revised Code has arrested a person without a warrant, he shall, without unnecessary delay, take the person arrested before a court or magistrate having jurisdiction of the offense, and shall file or cause to be filed an affidavit describing the offense for which the person was arrested. Such affidavit shall be filed either with the court or magistrate, or with the prosecuting

> attorney or other attorney charged by law with prosecution of crimes before such court or magistrate and if filed with such attorney he shall forthwith file with such court or magistrate a complaint, based on such affidavit."

[*33] The facts reveal that appellant was arrested by the Warren police on September 16. At the time of his arrest, appellant was in the process of being questioned by the police, a fact finding exercise that took the better part of the afternoon, and included a visit to the crime scene. The state did not file its complaint until September 17.

Appellant asserts that this twenty-four hour delay in the filing of criminal charges necessitates the exclusion of the taped statements made during that time period. The conceptual basis behind appellant's argument is based upon federal law. Cases such as *McNabb v. United States* (1943), 318 U.S. 332, and *Mallory v. United States* (1957), 354 U.S. 449, stand for the proposition that where federal officers interrogate a person, arrested without a warrant, instead of taking him to a federal judge, as required by Fed. R. Crim. P. 5(a), the statements of the defendant are excluded from testimony. This rationale was not premised on any provision of the Bill of Rights, and few states specifically adopted the *McNabb-Mallory* doctrine. In 1968, Congress abridged the doctrine, replacing it with the Omnibus Crime Control and Safe Street Act, [*34] which contained essentially the same provisions.

Ohio has expressly refused to adopt *McNabb, supra*, (*State v. Cowans* [1967], 10 Ohio St. 2d 96) and has never held that failure to comply with R.C.

2935.05 is grounds for exclusion of statements made during the interim. To the contrary, this court held, in *State v. Mackey* (Feb. 18, 1982), Portage App. No. 1142, unreported, that "a confession, which is otherwise voluntary, is admissible despite the fact the defendant was not taken before a court for arraignment without unnecessary delay." *Mackey, supra,* at 8. Even *In re Thompson* (1974), 4 O.O. 3d 359, relied upon heavily by appellant, does not suggest that the sanction for failure to comply with R.C. 2935.05 should be the exclusion of the statements. Moreover, *Thompson, supra,* states that the phrase "without unreasonable delay" should be interpreted to mean "within a reasonable time." *Thompson,* at 362.

This court does not conclude that the state waited an unreasonable amount of time before filing its complaint with the trial court. Nor, even were a violation of the statute found, would this court be empowered to grant the remedy requested by appellant, [*35] as Ohio courts will only apply the exclusionary role when the violation committed by the police concerns a constitutional right. (Failure to comply with R.C. 2935.05 would constitute only a statutory violation. See *Cowans, supra.* Consequently, appellant's sixth sub-argument is without merit.

In the final sub-argument to the first assignment of error, appellant challenges the validity of the admission of statements made during questioning which were allegedly procured during plea bargaining negotiations. The statements alluded to by appellant are those in which appellant was told that Timothy Combs was going to implicate him as

the perpetrator unless appellant cooperated. The taped confessions also reveal that appellant was told that the trial court would be informed if he cooperated. Appellant argues that the state impliedly promised appellant leniency if he were to cooperate. (Appellant does not categorize what, if any, promise the state made in exchange for his cooperation.)

Appellant correctly asserts that statements made during plea bargain negotiations are not admissible as evidence. *State v. Davis*, (1980), 70 Ohio App. 2d 48. However, the factual scenario described [*36] (and witnessed on tape) does not portray a plea bargain negotiation. As the state asserts, "[a] promise merely to bring any cooperation on the part of the defendant to the prosecuting attorney's attention does not constitute a coercive promise sufficient to render any subsequent statements involuntary and inadmissible." *United States v. Fera* (C.A. 1, 1980), 616 F. 2d 590, 594, (Citations omitted); (*United States v. Posey* (C.A. 5, 1980), 611 F. 2d 1389; *United States v. Frazier* (C.A. 5, 1970), 434 F. 2d 994; *United States v. Arcediano* (1974), 371 F. Supp. 457, 469, quoted in *State v. Edwards* (1976), 49 Ohio St. 2d 31, 40. The alleged plea negotiations which occurred in this case fit squarely within the rule enunciated in *Edwards, supra*. Consequently, appellant cannot, as a matter of law, have his statements excluded on the basis that the statements were coerced during plea bargain negotiations.

Appellant's first assignment of error is without merit.

Appellant's seventh assignment of error raises arguments similar to those raised in the first assignment. The seventh assignment challenges

appellant's ability to waive his Seventh Amendment right [*37] to a jury trial, under Crim. R. 23(A). Appellant cites *State v. Kehoe* (1976), 59 Ohio App. 2d 315, as requiring that a waiver of a jury trial must be (as with the waiver of all constitutional rights) "knowing, intelligent and voluntary."

In the case *sub judice,* appellant was afforded a separate hearing on January 7, 1986 for the purpose of determining whether appellant was making a voluntary, knowing and intelligent waiver. The trial court spoke with appellant for approximately forty-five minutes about the differences between a jury trial and a trial to a three judge panel. The trial court explained to the appellant that a panel of judges would hear evidence inadmissible before a jury; would not be subject to voir dire; would, in all probability, not grant appellant's request for a change of venue; and would already by privy to Timothy Combs' statements. Appellant stated that he understood these differences.

Following its explanation to appellant about the distinctions between bench trials and jury trials, the trial court presented appellant with a written waiver. Appellant was then permitted to discuss this waiver form with his attorney and his mother. Only after appellant [*38] returned from this discussion (which lasted approximately twenty-five minutes) and specifically asked for a three judge panel did the trial court accept appellant's waiver of this right to a jury trial.

There is no evidence in the record indicating that the trial court accepted the waiver without scrupulously ascertaining appellant's ability to understand the impact of his actions. Further, there

is enough competent evidence to determine that the trial court's decision was not against the manifest weight of the evidence. In so holding, this court does not express any opinion as to the ability of other mentally retarded persons to waive their constitutional rights. Such a decision will have to be made on an individual case by case basis, considering all appropriate facts and the totality of the circumstances of each case. This court does, however, hold that sufficient evidence exists in this matter to determine that appellant effectively (knowingly, intelligently and voluntarily) waived these constitutional rights.

Appellant's first and seventh assignments of error are without merit.

ASSIGNMENT #2

THE TRIAL COURT ERRED IN THE ADMISSION OF "OTHER ACTS" TESTIMONY.

In his second [*39] assignment of error, appellant asserts that the trial court erred by admitting evidence of "other acts" into the trial. He claims that this was a violation of R.C. 2945.59, Evid. R. 404(B), and the Due Process clause of the United States Constitution's Fourteenth Amendment.

The trial court permitted the state to introduce evidence of two prior rapes committed by the appellant when he was seventeen. This evidence was offered to prove motive, intent and the appellant's scheme for committing sexual assaults.

R.C. 2945.59 states that:

"In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

Evid. R. 404(B) provides that:

"Evidence of other crimes, wrongs, or acts is not admissible to [*40] prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

R.C. 2945.59 is to be strictly construed against the state and conservatively applied by a trial court. *State v. DeMarco* (1987), 31 Ohio St. 3d 191. Evidence of other acts of a defendant is admissible pursuant to R.C. 2945.59 *only* when it tends to show one of the matters enumerated in that statute and when it is relevant to prove the defendant's guilt of the offense in question." *DeMarco, supra*, paragraph one of the syllabus. (Emphasis added.)

The admission of the other acts of the appellant was proper because they tended to show the trial

court that the appellant intended to rape the victim. See *State v. Gardner* (1979), 59 Ohio St. 2d 14; *State v. Flonnory* (1972), 31 Ohio St. 2d 124.

Additionally, the appellee claims that even if the admission of the prior acts was erroneous, it was not prejudicial. In *State v. White* (1968), 15 Ohio St.2d 146, the court stated that improperly used [*41] testimony which could be cause for reversal at a jury trial would not necessarily be so at a bench trial. It must affirmatively appear on the record in a bench trial that the court relied on this improper testimony in arriving at its verdict in order for the error to be a ground for reversal. Accord *State v. Post* (1987), 32 Ohio St. 3d 380.

The trial court stated in its opinion that "no prior crimes were considered by the court in any way in reaching its verdict."

The second assignment of error is without merit.

ASSIGNMENT #3

THE TRIAL COURT IMPROPERLY ADMITTED CERTAIN EVIDENCE.

In his third assignment of error, the appellant contends that the trial court improperly admitted certain testimony of Raleigh C. Hughes, III, an ambulance attendant who saw the body at the site of the homicide, and certain testimony of Dr. Adelman. The appellant also claims that exhibit forty-seven, which the state asserts was the implement used by appellant to impale the victim, was improperly admitted. We will address the propriety of the admission of this exhibit in appellant's fourth assignment of error.

Evid. R. 402 provides that all relevant evidence is admissible, unless otherwise excluded. [*42] Evid. R. 401 states that relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." However, Evid. R. 403 expressly precludes the admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or of misleading the jury. Additionally, that rule also provides that relevant evidence *may* be excluded if its probative value is substantially outweighed by consideration of undue delay or needless presentation of cumulative evidence.

At the close of the direct examination of Hughes, the appellee asked him to state his opinion regarding the victim's condition relative to other people he had treated. After overruling appellant's objection, Hughes replied that "this is probably one of the most gruesome things I've ever seen." Appellant claims that this had no bearing on the evidence and was elicited to inflame the passion of the three judges and to shift the focus of the case from provable facts to the horrible nature of the crime and appellant's character.

[*43] In *White, supra*, the Ohio Supreme Court stated that they "indulge in the usual presumption that in a bench trial in a criminal case the [trial] court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *Id.* at 151. (Citations omitted.)

There is nothing in the record to show that this statement had any effect on the trial court's determination of appellant's guilt. We, too, indulge in the same presumption and conclude that the admission of this statement, although perhaps prejudicially erroneous in a jury trial, was not so here. See, also, *State v. Eubank* (1979), 60 Ohio St. 2d 183.

Parenthetically, it should be noted in assignments nine, eleven and twelve appellant alleges error, which if tried before a jury would require greater analysis by this court. However, this case was tried before a three judge tribunal and, unless the record clearly shows otherwise, this court will assume regularity and/or lack of prejudicial error.

Dr. Adelman testified that strangulation can cause the penis to become erect and that asphyxiation is often used by people to enhance their sexual orgasms.

[*44] Appellant states that this testimony was of no probative value, and that there was an insufficient basis for the testimony. As to the latter contention, appellant does not explain why the basis for the testimony was insufficient.

Bite marks on the victim's penis were later identified by Dr. Mertz, a dentist and forensic odontologist, as those of the appellant's. The appellee maintains that the victim could have been asphyxiated in order to cause an erection for purposes of oral sex. Since the teeth marks on the victim's penis, when measured by Dr. Mertz at the morgue, were consistently smaller than the actual size of the impression of appellant's teeth, Dr. Mertz stated that the victim's penis was probably erect at

the time it was bitten. If this were true, then the marks on the victim's penis would be proportionately smaller when measured by Dr. Mertz. Therefore, the testimony that the strangulation, *i.e.*, asphyxiation, can cause a penis to become erect was probative testimony, shedding light on precisely what occurred that fateful day.

The third assignment of error is without merit.

ASSIGNMENT #4

THE TRIAL COURT ERRED IN ADMITTING EXHIBIT 47, A "STICK".

In appellant's [*45] fourth assignment of error and part of his third, he contends that the trial court erred by admitting into evidence a piece of wood, which looked like the end of the handle of a household broom or mop. This piece of wood was identified as state's exhibit forty-seven. According to the appellee, it was forcibly inserted into the victim's rectum, causing internal damage and bleeding.

This handle was found in the thick brush of a field approximately six feet from a bicycle path. Donald Allgood, sixteen at the time of the trial, testified that from a distance of abut thirty yards, he saw the appellant walking on the bicycle path and toss a stick into the field with a flick of his wrist. Although Allgood stated that the stick was about twelve inches long, he also indicated that it could have been a branch. After a search of the area was conducted by the police, the end of the broken handle was found.

Appellant states that the exhibit should not have been admitted because Dr. Adelman could not positively say that the broom handle was the item

which caused the damage to the victim's rectum and bladder. An examination of the victim's damaged internal organs revealed that plant material was [*46] present but this cellular material could not be positively identified as originating from the broom handle introduced as exhibit forty-seven.

Mr. Dehus, a criminologist and forensic science analyst, testified for the appellant. He stated that he tested the stick for blood and did not find any traces. He indicated that a pourous object such as exhibit forty-seven, if used in the manner claimed by the state, would normally absorb fluids, and traces of blood should have been found when it was tested. However, on cross-examination, he qualified his response by noting that he had been involved in cases in which the weapon did not have blood on it. He also agreed that an object could be "wiped" or "washed clean" eliminating the traces of blood.

Appellant, in the fourth assignment of error, states that the trial court improperly drew an inference from another inference.

During the course of a statement appellant made to the police shortly after the incident, a Warren police officer asked the appellant what another individual inserted into the victim's rectum. Appellant responded: "A stick. Like a broom handle thing * * *."

Dr. Adelman performed the autopsy on the victim and took several [*47] photographs of the damaged organs. He compared exhibit forty-seven with the tears in the victim's internal organs and concluded that the size and shape of the point of the stick were very compatible with the size and shape of the opening of the rectum. He described the "fit" as

similar to a key in a lock. Dr. Adelman also testified that both ends of the broom handle had probably been inserted into the victim's rectum. He stated on direct examination:

> "The sharp end of the stick is -- would have made the penetration through the rectum and the urinary bladder that I've described. The blunt end of the stick would have made the mark on the rectum that did not penetrate; just a contusion, and the size relationships are quite consistent."

James Wurster, a criminalist employed by the Ohio Bureau of Criminal Identification and Investigation who specializes in the detection and identification of blood, stated that rain or dirt could have removed blood on a stick such as exhibit forty-seven.

The admission of exhibit forty-seven was not improper based on the statement of the appellant and the testimony of Dr. Adelman and Messrs. Dehus and Wurster. Additionally, there was no attempt to draw [*48] one inference upon another. The testimony elicited showed that appellant stated that "a broom handle thing" was inserted into the victim's rectum, that appellant was observed throwing a stick into the brush of a field near the homicide site, that the end of a broom or mop handle was found in the area where a witness saw the appellant throw a stick, and that the "jagged edge" of exhibit forty-seven fit the opening in the victim's rectum like a key in a lock. These direct facts were presented in evidence in order for the court to make one inference--that exhibit forty-seven was the object which was inserted into the rectum of the victim. The

admission of exhibit forty-seven, based on these facts, was not improper.

Appellant's portion of his third assignment of error relating to exhibit forty-seven and his fourth assignment of error are without merit.

ASSIGNMENT #5

THE RIGHT TO CONFRONT WITNESSES WAS VIOLATED.

In his fifth assignment of error, appellant contends that his right to confront a witness was improperly denied. A seventeen year old boy who had been incarcerated at the Juvenile Justice Center testified that, while he was in one of the cells, the appellant tried to have [*49] sex with him.

Appellant claims that the appellee called Stephen Melius to the stand without prior disclosure to the appellant. Appellant also claims that when the witness was later recalled, it became "quite apparent that the witness's potential further testimony had been thoroughly reviewed with the prosecutor". Appellant asserts that he was effectively denied the right to full cross-examination of this witness and relies on *State v. Prater* (1983), 13 Ohio App. 3d 98, for the proposition that a state's witness may not have his memory refreshed during a recess when still subject to cross-examination.

The appellee's position was that it did not know about the witness until the previous afternoon. The trial court indicated that if the appellant wished to cross-examine the witness later, it would order him to remain in the county and that it would consider a request for a continuance so that appellant could investigate the witness.

The right to cross-examine a witness is a fundamental right applicable to the states. *Pointer v. Texas* (1965), 380 U.S. 400. Appellant was afforded this right, as well as the right to further cross-examination after investigation. In *Davis* [*50] *v. Alaska* (1974), 415 U.S. 308, the Supreme Court stated that the improper limitation on the right to cross-examination was an effective denial of the right to confront a witness.

In the case at bar, no restrictions were placed on appellant's right to cross-examine Melius; therefore, we cannot say that appellant's right to confront this witness was violated in any way. See *Prater, supra.* It should be noted that counsel did not request a continuance, but the witness was required to be available for recall by the defense. He was indeed subpoenaed and recalled by appellant. As such, the appellant was afforded an opportunity to prepare for and cross-examine Melius.

Second, appellant objects to the alleged "coaching" by the prosecution of this witness. The transcript reveals that an assistant prosecutor had spoken with the witness prior to being recalled. Melius, when questioned by appellant's counsel during recall, stated that he was informed that the defense was:

> "Going to subpoena me back into court, and he told me to some of the questions that you might ask me."
>
> "* * *
>
> "He said that you might---that you might ask me if that I gave some of the wrong dates and stuff like that."

[*51]Then when questioned by the state, the following occurred.

> "Q. Steven when I talked to you this morning, I told you that Jim Lewis [appellant's trial counsel] subpoenaed you, did I tell you to make any kind of story up?"
>
> "A. No, sir.
>
> "Q. Did I tell you to tell the truth?
>
> "A. Yes, sir."

This exerpted language represents the sum of the evidence before this court of appellee's alleged wrongdoings. As such, the evidence is insufficient to show that the state "coached" the witness beyond simply urging him to tell the truth. Moreover, as noted by the state, the witness' testimony "after coaching" did not differ from the prior day's narration on the witness stand. From this evidential table, this court is unable to conclude that the state engaged in any improprieties of a prejudicial nature.

In *Prater*, the trial court specifically instructed the prosecution not to talk to a witness during a break in the trial. Although the prosecutor disobeyed the order, the trial court concluded that even this "flagrant violation" of the court's effort to afford the defense a fair opportunity for effective cross-examination, did not deny the appellant the opportunity for full and effective [*52] cross-examination, in light of all of the evidence offered. The court in *Prater* also stated that the prosecution cannot use a trial recess to coach a witness before defense counsel has finished his cross-examination of that witness. Since there was no such order, by the trial court, for the prosecutor in the case at bar to

refrain from discussing the case with Melius, and it appeared that cross-examination had terminated, the assignment of error is without merit.

ASSIGNMENT #6

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO INCLUDE LICENSED DRIVERS IN THE POOL OF LICENSED DRIVERS. [*SIC*]

Appellant asserts in his sixth assignment of error that the trial court erred by denying his motion to include licensed drivers in the pool of prospective jurors. He states that the selection of potential jurors from voter registration lists did not adequately reflect a fair cross-section of the community.

In the case at bar, appellant waived his right to a trial by jury. The trial was heard before a three judge panel, therefore, the denial of this motion could not possibly have had any effect on the trial.

This assignment of error is without merit.

ASSIGNMENT #8

THE [*53] TRIAL COURT ERRED IN DENYING THE APPELLANT FUNDS TO EMPLOY AN EXPERT WITNESS FOR A MOTION HEARING.

In his eighth assignment of error, appellant asserts that the trial court erred by denying him the necessary funds to employ an expert witness to show that appellant's motion for closure of the pretrial hearings was necessary to preserve a fair and impartial jury. He states that closure is an effective means of ensuring an impartial jury, and that an indigent defendant should be provided at all times

with the reasonably necessary means of obtaining proper representation.

As it was stated in the sixth assignment of error, appellant waived his right to a trial by jury and was tried by three judges, not a jury of his peers. This court cannot help thinking that appellant's counsel upon appeal is slightly misplaced. The fact that appellant waived his right to trial by jury renders this assignment of error moot. Prior to executing his waiver of a jury trial, appellant was informed that the pretrial motions addressed in assignments six and eight would, "in all probability," be overruled if appellant waiver his rights to a jury trial. The trial court correctly concluded that appellant's motions [*54] would be anamolous in a trial to a three judge tribunal. Appellant indicated that he understood the effect of his waiver, and that it would result in the motions being overruled.

This court will not indulge appellant and analyze this assignment of error as if there *had* been a trial by jury.

The eighth assignment of error is without merit.

ASSIGNMENT #9

THE ADMISSION OF EXHIBIT 3 (A PHOTOGRAPH OF RAYMOND FIFE) WAS ERROR.

Appellant maintains in his ninth assignment of error that the admission of exhibit three, a school photograph of the victim taken prior to the assault in question, was error. Also, appellant claims that it was improper to permit the victim's mother to testify about family matters, and that it was wrong to

permit the prosecutor to comment on the victim's good character during closing argument.

We find this assignment to be without merit.

First, appellant's counsel failed to object to the admission of the photograph, testimony or prosecutor's comments at trial. This failure precludes appellant from objecting now. *State v. Wade* (1978), 53 Ohio St. 2d 182, at paragraph one of the syllabus.

Appellant's argument would be more persuasive in a jury trial. [*55] The admission of the photo before a three judge panel, however, was, at best, harmless error. There is no evidence that the court was swayed by testimony of the victim's mother or the claimed erroneous comments of the prosecutor.

The assignment of error is overruled.

ASSIGNMENT #10

THE APPELLEE DID NOT GIVE THE APPELLANT COMPLETE DISCOVERY.

The tenth assignment deals with the extent of discovery provided by the state to the appellant. Appellant objects that the following were not provided to him:

"1. Allgood identified appellant from a photo array.

2. That photo array.

3. Exhibits 103-109.

4. Oral statements of appellant concerning those exhibits.

5. The statement of Stephen Melius.

6. The photographs used by Dr. Levine."

Appellant recognizes the foregoing lapses in discovery here, when viewed in a bifurcated context are not detrimental, but argues the cumulative impact of all these items reaches plain error.

The state contends that there was sufficient other evidence to convict appellant. Also, the court afforded appellant additional time to prepare for both witnesses, Stephen Melius and Dr. Levine, indicating it was willing to grant a continuance. However, appellant's [*56] counsel deigned not to request the time and continued forward with the proceeding. Further, the specific photographs were supplemental, and, in some instances, duplicative of pictures that were already in evidence.

Appellant failed to show that the state did not make a good faith effort to supply all relevant materials. No plain error is found.

Appellant's tenth assignment is meritless.

ASSIGNMENT #11

ADMISSION OF CERTAIN PHOTOGRAPHS WAS AN ABUSE OF DISCRETION.

Appellant objects to the admission of exhibits which show the stick in relation to the cavity of the victim. He alleges this prejudiced the outcome.

Appellant notes the proper standard for admissibility of photographs from *State v. Woodards* (1966), 6 Ohio St. 2d 14. The court noted:

> "* * * The role is well settled that photographs and color transparencies are not objectionable so long as they are properly identified, are relevant and competent and are accurate representations of the scene which they

purport to portray. Indeed, photographs frequently convey information to the court and jury more accurately than words.

"Although a photograph may be rendered inadmissible by its inflammatory nature, the mere [*57] fact that it is gruesome or horrendous is not sufficient to render it inadmissible if the trial court, in the exercise of its discretion, feels that it would prove useful to the jury.

"The real question is whether the probative value of such photographs is outweighed by the danger of prejudice to the defendant." *Woodards, supra,* at 24-25. (Citations omitted.)

Appellant also cites *State v. Luft* (Dec. 26, 1978), Franklin App. No. 78AP-302, unreported. It, as well as *Woodards,* recognized the objectionable nature of some photographs, but nonetheless found harmless error with their admission.

In this cause, admission of the photographs does not rise to the crest of prejudicial error. There was sufficient other evidence as to the guilt of the defendant. Further, the exhibits were used to show the penetration of the stick and the "lock and key" fit of the stick to the injuries. Finally, the proceeding was had before a three judge panel rather than a jury, and the presumption remains that they only considered relevant evidence.

This assignment is overruled.

ASSIGNMENT #12

THE STATE MADE IMPROPER CLOSING ARGUMENTS AT BOTH THE GUILT AND MITIGATION PHASES OF THIS CASE.

[*58] Appellant alleges the prosecutor made improper remarks during closing arguments. He lists fourteen separate instances during both closing at trial and closing at the mitigation stage of the proceedings.

The assignment is without merit.

Initially, it should be noted that appellant's attorney failed to object at the time to any of the statements. Appellant is precluded from raising it as error now. *Wade, supra.*

Further, a prosecutor is granted great leeway during closing argument, but there still are bounds within which he most operate. However, error will only be found if the remarks affected the verdict. See *State v. Wiggins* (Sept. 30, 1988), Lake App. No. 12-258, unreported.

Given the nature of the offense involved, the circumstances surrounding the death of the victim, and the length of the closing argument, it does not appear this would constitute prejudicial error, but merely harmless error, at best.

Finally, as noted previously, the trial was conducted before a three judge panel and not a jury, and the record fails to disclose any prejudice.

ASSIGNMENT #13

THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant alleges ineffective assistance [*59] of counsel. He lists seven means by wnich counsel at trial was ineffective. These include:

> "(1) counsel should have had hearings on the pretrial motions that were filed;
>
> "(2) counsel should have attempted to seat a jury before waiving that right;
>
> "(3) counsel failed to fully advise the appellant of his legal rights concerning appellant's waiver of a jury trial so that he could voluntarily, knowingly and intelligently make such a decision;
>
> "(4) counsel should have continuously objected to an officer's belief that the appellant was lying;
>
> "(5) counsel's failure to timely file a a motion for new trial with a hearing;
>
> "(6) counsel's failure to object to appellee's improperly closing argument; and
>
> "(7) counsel's failure to preserve the record or otherwise object on any issue that this court or any future court deems waived by such omission."

Appellant prefaces his argument by suggesting that he simply is preserving his right to appeal on this issue. As such, he just merely asserts how counsel was ineffective.

However, the Ohio Supreme Court has developed the proper framework to determine ineffective assistance of counsel. In *State v. Lytle* (1976), 48 Ohio St. 2d 391, [*60] the court indicated:

> "* * * [T]here must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties as to his client. Next and analytically separate from the question of whether the defendant's sixth amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." *Id.* at 396-7.

This was interpreted in *State v. Smith* (1981), 3 Ohio App. 3d 115, where the court held:

> "In order to establish prejudice to defendant resulting from a lack of effective assistance of counsel, defendant must establish upon appeal a substantial violation by counsel of an essential duty to his client. The defendant must then establish his defense was prejudiced by the violation of any such duty. *State v. Lytle* (1976), 48 Ohio St. 2d 391 [2 O.O. 2d 495]. In light of the presumption of competency attributed to counsel in Ohio, the burden upon a defendant to establish ineffective assistance of counsel is a heavy one. *Vaughn* v. *Maxwell* (1965), 2 Ohio St. 2d 299 [31 O.O. 2d 567]." *Id.* at 120.

Independent review of the record fails to disclose where the [*61] second prong of the *Lytle* test has been met in connection with the seven claimed deficiencies of trial counsel. In other words, the record fails to demonstrate where appellant was

expressly prejudiced by the alleged omissions and/or commissions of trial counsel.

In this cause, many of the alleged deficiencies of trial counsel more aptly challenge counsel's strategies and tactics. "* * * [M]any trial tactics may be questioned after an unfavorable result. A fair assessment of attorney performance requires us to eliminate the distorting effect of hindsight." *Post,* at 388. Moreover, *Strickland v. Washington* (1984), 466 U.S. 668, states that tactical decisions may not be the basis of demonstration of ineffective assistance of counsel, absent a showing of prejudice. See, also, *State v. Peine* (July 21, 1989), Lake App. No. 13-088, unreported, at 14-15. As stated, there is no showing of prejudice here. This court will not indulge in speculation regarding counsel's motivation in waiving a jury trial and his subsequent strategies and tactics employed before the three judge panel, including any judgmental exercise appellant's counsel may have considered to the effect [*62] that a gruesome factual scenario is less apt to influence emotionally a panel composed of judges than a jury of lay people.

In addition, appellant's assignment is deficient for failing to comply with the Appellate Rules. Specifically, appellant, in his brief, fails to folly develop his argument as required by App. R. 16 (A)(4), and pursuant to App. R. 12, this court may disregard "[e]rrors not specifically pointed out in the record and separately argued by brief * * *."

Appellant's thirteenth assignment is without merit.

ASSIGNMENT #14

IT WAS ERROR FOR THE TRIAL COURT TO SENTENCE APELLANT ON THE KIDNAPPING CHARGE AND THE KIDNAPPING SPECIFICATION.

Appellant alleges that the rape and kidnapping were offenses of similar import and appellant should have only been convicted of one. As such, only one should have been used for the aggravating specification during the mitigation phase. He argues the cause should be remanded for new sentencing without the kidnapping specification.

Appellant relies upon *State v. Logan* (1979), 60 Ohio St. 2d 126, where the court found that rape and kidnapping were of similar import and thus it was error for the court to convict on both counts. [*63] The reason was that the court could not find "* * * that appellant had a separate animus to commit kidnapping." *Logan, supra* at 135. The *Logan* court continued:

> "Within this pronounced rule we adopt the policy that where murder, the taking of a hostage, or extortion is the underlying crime, a kidnapping in facilitation thereof would generally constitute a separately cognizable offense." *Logan,* at 135.

Clearly, the court noted the exception in situations which a murder is committed.

More recently, courts have focused upon the requirement of "separate animus" when analyzing rape and kidnapping. The court in *State v. Henry* (1987), 37 Ohio App. 3d 3, found separate animus.

"When the *Logan* standard is applied to the facts in the instant case, it is apparent that a separate animus does in fact exist and, therefore, separate convictions are proper. First, the restraint was prolonged. The victim was abducted at approximately 1:30 a.m. and was not released until approximately 4:04 a.m. Second, the confinement was secretive. The abductors kept the victim's head down so that she would not be seen in the automobile. Moreover, when a police officer approached the automobile [*64] the victim was threatened and told not to let the officer know that she was in the automobile. Third, the movement involved was substantial. The victim was abducted in Bowling Green, driven to Toledo and then returned to Bowling Green. Fourth, there was a substantial increase in risk of harm to the victim. The farther the victim was removed from Bowling Green and the longer she was restrained, the less likely it was that she would be returned safely. The victim was taken on country roads and could have been killed or abandoned without encountering assistance nearby. Since the victim was taken in an automobile and driven a substantial distance, she was subjected to a risk of injury from the operation of the motor vehicle which was separate and distinct from the injury she was exposed to from the rapes." *Henry, supra* at 9.

In this cause we have similar facts except for the distance of the asportation and the exact length of time. The restraint was long. The evidence supports the conclusion that the restraint lasted approximately forty-five minutes. The confinement here was also secretive. The victim was dragged off the traveled path. Third, after awakening and attempting to flee, [*65] the victim was again

grabbed and dragged back into the woods. His mouth was covered to prevent pleas for help. The appellant remained with the victim while the co-defendant left to obtain the lighter fluid. These facts demonstrate the separate animus for the kidnapping and the rape.

The assignment is without merit.

ASSIGNMENT #15

THE MOTION FOR NEW TRIAL SHOULD HAVE BEEN GRANTED.

Appellant asserts that the trial court erred in denying his motion for a new trial without first holding a hearing to determine the merits of the motion. On February 14, 1986, appellant filed a motion for a new trial without any supporting materials. In that motion, appellant requested an extension of time to file the supporting evidence. However, on March 31, 1986, the court overruled appellant's new trial motion.

On April 7, 1986, appellant filed a motion to set aside the March 31, 1986 entry. Appellant filed an affidavit on April 7, 1986 in which Raymond Vaughn, appellant's half-brother, recanted his trial testimony. In the affidavit, he denied seeing appellant washing blood out of his pants. He further averred that he so testified at trial because of the coercion of the prosecutor.

The trial court [*66] set the matter for hearing on May 8, 1986. However, apparently without holding the hearing, the court overruled the appellant's motion to vacate. Though not specifically articulated, appellant alleges that the court abused its discretion by denying the motion without conducting a hearing.

This assignment is without merit.

Initially it should be noted Crim. R. 35 provides the basis upon which a new trial can be granted. It is incumbent upon the moving party to identify the basis for his motion and provide support for the allegation by material of evidential quality.

In *Toledo v. Stuart* (1983), 11 Ohio App. 3d 292, the court in the syllabus held:

> "1. Motions for new trials, made pursuant to Crim. R. 33, are not to be granted lightly. When such a motion is made pursuant to Crim. A. 33(A)(2), in which misconduct by jurors, prosecution witnesses or the prosecuting attorney is alleged, affidavits in support thereof must be submitted with the motion as further required by, and specified in, Crim. R. 33(C). If the defendant fails to produce supporting affidavits, the trial court, in its discretion, may deny the motion summarily without a hearing. (Crim. R. 33[A][2] and [C], construed.)
>
> [*67] "2. Neither the trial court's ruling on the new trial motion nor its decision on whether to hold a hearing thereon, will be disturbed on appeal in the absence of a clear showing that the court abused its discretion." (Emphasis in original.)

Furthermore, nothing in the Criminal Rules requires that a hearing be held. To the contrary, case law has endorsed the proposition that the decision to grant a hearing rests with the discretion of the court. This was noted in *State v. Williams* (1975), 45 Ohio St. 2d 88.

"'The granting of a motion for a new trial upon the ground of newly discovered evidence is necessarily committed to the wise discretion of the court, and a court of error cannot reverse unless there has been a gross abuse of that discretion. And whether that discretion has been abused most be disclosed from the entire record.' *State v. Lopa* (1917), 96 Ohio St. 410, 411." *Williams, supra*, at 93.

This was also noted in *United States v. Kearney* (C.A. D.C., 1982) 682 F.2d 214.

> "A motion for a new trial may be decided on the basis of affidavits without an evidentiary hearing. * * *"
>
> "* * * '*Moreover, the necessity for a hearing is diminished in* [*68] *cases involving challenged testimony where the trial judge has an opportunity to observe the demeanor and weigh the credibility of the witness at trial.*'" *Kearney, supra*, at 219. (Citations omitted.) (Emphasis in original.)

In the original motion for new trial and the motion to vacate, appellant itemizes a number of reasons for new trial. However, appellant filed only one affidavit in support of the motion, and it was only applicable to one of the bases for new trial. As such, appellant has failed to fulfill the evidential requirements of Crim. R. 33. Therefore, the court did not abuse its discretion in denying the motion without a hearing.

Further, it should be noted appellant's grounds for a new trial, though not in response to the new trial motion, had been considered and reviewed by the trial court. In addition, appellant's theories of

innocence have been reviewed by this court and rejected in other assignments of error.

Finally, no error obtains where the evidence is such that the outcome of the trial would not be different. See, *e.g.*, *State v. Duling* (1970), 21 Ohio St. 2d 13. In this cause, the evidential table is sufficient, even excluding the testimony in question, [*69] which was recanted in Vaughn's affidavit, that was filed with the motion to vacate, to support a conviction. Furthermore, the testimony by the witness, in this cause, is not pivotal to appellant's conviction because it has little, if any, probative value in determining his guilt or innocence.

The fifteen assignment is rejected.

ASSIGNMENT #16

THE TRIAL COURT WAS IMPROPERLY PREVENTED BY (sic) DECIDING WHETHER DEATH WAS THE APPROPRIATE PUNISHMENT.

Appellant's sixteenth assignment of error alleges that the death penalty statute prevents the court from deciding whether the death penalty is appropriate. He argues because the statute mandates imposition of the death penalty if the aggravating circumstances outweigh the mitigating factors, the court is not permitted to determine if the death penalty is appropriate. He suggests that the court is "bound by the weighing process and [is] prohibited from deciding whether nevertheless death is inappropriate."

Appellant theorizes that the court is precluded from imposing life imprisonment out of a desire for

mercy or simply because it feels the death penalty is inappropriate.

However, this has been rejected in *Jenkins, supra,* and *State* [*70] *v. Buell* (1986), 22 Ohio St. 3d 124. Further the statute provides that the court may consider not only the six specified mitigating factors, but "any other factors that are relevant to the issue of whether the offender should be sentenced to death." R.C. 2929.04(B)(7). As such, the court does have discretion to consider "* * * a broad range of specified and unspecified factors in mitigation of the imposition of a death sentence." *Jenkins,* at 174.

This assignment is denied.

ASSIGNMENT #17

THE TRIAL COURT FAILED TO CONSIDER ALL OF THE EVIDENCE IN SUPPORT OF MITIGATING A DEATH SENTENCE.

In this assignment, appellant alleges that the court failed to consider all of the mitigating factors in sentencing appellant to be executed. Specifically, appellant argues that the court failed to consider the possible brain damage he suffered from injuries, his low mental age, and his good institutional record.

The first two are fairly similar in nature in that the injuries may have contributed to his low intelligence level or low mental age. However, the court clearly did consider this when it noted:

"The court considered the following factors in possible mitigation:

"* * *

"2) [*71] The low intelligence of the defendant.

"* * *

"Neither low intelligence nor impaired judgment were given significant weight since no high degree of intelligence was necessary to understand the events of rape, kidnapping, arson and murder as committed on the night of the crime, and to classify participation in such events as poor judgment seems ridiculous."

Generally, the court did consider appellant's low mental age.

Appellant's mother during mitigation also testified that appellant had fallen off a swing and, on another occasion, had been hit by an automobile. However, no express evidence was offered which indicated appellant's retardation was the result of the physical traumas. To the contrary, evidence was offered which suggested that seventy-five percent of the time, the cause of the retardation is unknown. Furthermore, Dr. Crusin indicated that neither of the injury reports indicated brain damage. As such, there was no evidence before the court which it could consider during mitigation on this subject.

Though not specifically identified by the trial court, it had before it the evidence of appellant's good institutional record. At the mitigation hearing, the appellant presented [*72] a number of witnesses who testified about appellant's activities at Brinkhaven and TCY. This testimony tended to suggest that appellant was a follower, not a leader. This, too, was considered by the court where it noted:

"The court considered the following factors in possible mitigation:

"* * *

"6) Whether or not he was a leader or follower."

Independently, though the court may not have expressly listed appellant's good institutional record as an item of mitigation, that evidence was before the court. Further, it appears that the court considered it in making its determination. Simply because the court did not identify it specifically is not grounds for reversal. To permit such would open the door for reversal of every sentence because the courts fail to list and discount every possible mitigating factor. This is clearly unreasonable.

The constitutionality of the weighing process employed by the trial court in this case can be seen by contrast to that employed by the Texas court in *Penry* (which was found to be constitutionally deficient). Under Texas law, the jury was restricted in its application of mitigation evidence by the statutory requirement which dictated that the [*73] jury answer three specific questions. These questions were whether the defendant acted deliberately with the reasonable expectation that death would result; whether there was a probability that the defendant would continue to commit criminal acts of violence; and, whether the conduct of the defendant was unreasonable in response to the provocation. *Penry*, 492 U.S. __, 106 L. Ed. 2d at 272.

The Supreme Court held that the Texas statutory scheme was flawed because the jury was not informed that it could give effect to mitigating evidence of petitioner Penry's mental retardation and abused background. Further, a trier of fact who attempted to give effect to petitioner's mitigating

evidence of failure to learn from his mistakes, would be forced to conclude that petitioner would continue to commit violent crimes. The court held that the trier of fact must be allowed to express a "reasoned moral response" and remanded the case for resentencing. *Penry*, 492, U.S. __, 106 L. Ed. 2d at 284; see, also, *Lockett* v. *Ohio* (1978), 438 Ohio St. 586, 605.

By contrast, R.C. 2929.04(B) allows for the consideration of several mitigating factors, including "any factors that are [*74] relevant to the issue of whether the defendant should be sentenced to death." 2929.04(B)(f). Further, the statute dictates that "the defendant shall be given great latitude in the presentation of evidence of the "mitigating factors * * *." 2929.04(C). Therefore, it can be seen that, under Ohio law, the trier of fact is not precluded from considering mitigating factors and the weighing process cannot be found to violate due process.

Appellant's seventeenth assignment is without merit.

ASSIGNMENT #18

A SENTENCE OF DEATH IS UNCONSTITUTIONAL.

Appellant's eighteenth assignment of error challenges the constitutionality of the death penalty on numerous grounds. However, as he notes, the issues that he raises have been previously addressed and rejected by the Ohio Supreme Court and/or the United States Supreme Court.

First, appellant argues that the death penalty is cruel and unusual punishment because it is:

1) degrading to the dignity of human beings; 2) arbitrarily, freakishly and discriminatorily inflicted; and 3) applied at the uncontrolled discretion of the prosecutor. These arguments have been rejected in *Jenkins, supra*, and *State v. Zuern* (1987), 32 Ohio St. 3d [*75] 56.

Second, appellant argues the death penalty violates the due process clause because: 1) it is not the least restrictive means to serve a compelling state interest; 2) it is not an effective deterrent; and 3) incarceration is the more appropriate means.

In *Jenkins*, at 168, the court noted that the United States Supreme Court has repeatedly rejected the "least restrictive means" argument. In *Gregg v. Georgia* (1976), 428 U.S. 153, the court rejected the deterrence theory leaving the resolution of that particular issue with the state legislatures. The court in *Spanzio v. Florida* (1984), 468 U.S. 447, in rejecting appellant's final position, cited *Gregg, supra*, and noted that the death penalty may be the only appropriate sanction for certain criminal acts which are so grievous "an affront to humanity." *Spanzio, supra*, at 184.

Appellant next takes issue with the state's statutory framework under which the death penalty may be imposed. The challenges include 1) execution may be had without proof of intent (rejected in *Jenkins*, at 171); 2) failure to establish a stringent standard of proof (rejected in *Jenkins* and *State v. Maurer* [1984], 15 [*76] Ohio St. 3d 239); 3) the jury is not permitted to consider its own doubt as to the defendant's guilt (rejected in *State v. Roe* [1989], 41 Ohio St. 3d 18); 4) the state is not required to prove the absence of mitigating factors (overruled in *State*

v. Lawrence [1989], 44 Ohio St. 3d 24, *rev'd.* on other grounds); 5) the sentencing scheme requires mandatory imposition of the death penalty (overruled in *Buell, supra*); 6) the bifurcated process does not sufficiently narrow the category of defendant's eligibility for the death penalty (rejected in *Jenkins*); and 7) the appellate review process (rejected in *Buell* and *Jenkins).*

Fourth, appellant argues that the sentencing hearing conducted before the same body which tried him denies his right to effective assistance of counsel. He maintains defense counsel is unable to fully argue all elements of a case utilizing two separate defenses: one during the guilt phase and a different one during mitigation. The exact argument was rejected in *State v. Mapes* (1985), 19 Ohio St. 3d 108, at 117, and *State v. Hicks* (1984), 43 Ohio St. 3d 72.

Next, appellant hypothesizes that the state's capital punishment [*77] statutes are unconstitutional because they subject appellant to double jeopardy. In essence, appellant suggests that by permitting the state to use the underlying aggravating felony associated during the sentencing stage violates the Constitutional provision prohibiting double jeopardy. This argument was overruled in *State v. Brown* (1988), 38 Ohio St. 3d 305, and *State v. Barnes* (1986), 25 Ohio St. 3d 203.

In the sixth constitutional attack, appellant alleges that the death penalty statutes are overly broad. Appellant's specific challenge was rejected in *Buell.*

The eighteenth assignment is without merit.

ASSIGNMENT # 19

THIS COURT CANNOT FIND THAT AFTER REVIEWING ALL OF THE FACTORS OF R.C. 2929.05(A) THAT DEATH WAS THE APPROPRIATE SENTENCE FOR DANNY LEE HILL.

The nineteenth assignment essentially is an overview of the mandatory review procedure imposed upon this court by statute.

Initially, appellant suggests that the evidence was insufficient to support the conviction. Appellant attempts to identify the conflicting evidence which would tend to create reasonable doubt as to his guilt. He further suggests that the evidence "is almost entirely circumstantial" [*78] and would be insufficient to support the imposition of the death penalty. However, a more thorough review of the evidence which was before the trial court indicates that the evidential table is more than sufficient to permit a finding of guilt.

First, appellant, who voluntarily went to the police station, noted that the victim was choked with his underwear. This information could only have been known then by the investigators and the perpetrators.

Appellant was identified by a witness as the individual who tossed aside an object like a stick in the field. The state's expert identified the stick as the probable cause of the perforation of the rectum and urinary bladder. Further, there is evidence which suggests that the codefendant was acting as a look out while appellant assaulted the boy.

The state also presented the testimony of a forensic odontologist who stated:

> "It's my professional opinion, with reasonable degree of medical certainty, that Hill's teeth, as depicted by the models and the photographs that I had, made the bite marks on [the victim's] penis."

He also "excluded Combs altogether" as the source of the bite marks, concluding, "I'm sure on the exclusion [of Combs] [*79] as well as the identification" of Hill as the source of the bite marks. Similarly, appellant's own witness on this subject concluded that it was likely that one of the bite marks belonged to appellant.

Next, appellant alleges that the aggravating circumstances do not outweigh the mitigating factors. Appellant alleges that the mitigating factors which include his low I.Q., his family background and his institutional record justify life imprisonment.

However, the trial court's analysis of the aggravating circumstances weighed against the mitigating factors support its conclusion. The court indicated it considered the underlying facts of each of the specifications in the weighing process. The evidence of the rape included the biting of the penis, leaving teeth marks; the pulling of the genitalia, bruising the pelvic area; and the penetrating of the anus with the broom stick, perforating the rectum and rupturing the urinary bladder. The underlying facts regarding the arson indicate the victim was burned about his face and shoulders. The kidnapping evidence suggested the appellant was tackled off his bicycle, slammed on the bicycle pedal, kicked about and then moved to conceal the other [*80] crimes.

Further, appellant, after being involved in these acts, went to the police station to inquire about the reward. At the same time, appellant was attempting to implicate others to divert attention from himself. This evidence indicates a lack of remorse, a callous attitude and the heinous nature of his character. All are appropriately considered by the court and are against the fabric of mitigation.

Appellant suggests that the death penalty is inappropriate and argues that the sentence is the result of passion and prejudice. The record does not reflect this. Rather, the judges listened to the evidence and properly convicted appellant. Then, the court, after the mitigation hearing, determined that the death penalty was appropriate.

Next, appellant maintains that the death penalty is disproportionate to other capital cases. As required by statute, this court is required to compare this case against other aggravated murder cases in this district. To date, in only two other cases *State v. Glenn* (Feb. 15, 1985), Portage App. No. 1286, unreported, and *State v. Wiles* (June 3, 1988), Portage App. No. 1675, unreported, did this court affirm the imposition of the death [*81] penalty.

In *Glenn, supra,* the defendant had devised a plan to effectuate the escape of his half-brother from the Mahoning County Jail. During the escape attempt, the defendant shot and killed a reserve deputy sheriff who was transporting the prisoner from the jail to a doctor's office. During mitigation, appellant called two witnesses who testified about the defendant's upbringing and environment. However, the jury recommended the death penalty, finding

that the aggravated circumstances outweighed the mitigating factors. *Glenn*, at 1-3.

In *Wiles, supra*, the defendant was burglarizing the home of his former employers. He thought that the home was unoccupied but was confronted by the son of the owners. The defendant proceeded to stab the victim at least eleven times and left the knife in the victim's back. The victim died as a result of the stab wounds. This court affirmed the conviction and imposition of the death penalty.

By comparison, the sentence in the present cause is not disproportionate. The facts in this cause, including the sexual assault and physical beating, the torture, the burning, the strangulation, and method of death, the attempted concealment of the body, [*82] and appellant's callous lack of remorse constitute criminal acts which are so grievous an "affront to humanity" to justify the death penalty. *Spanzio*, at 184. Further, nothing suggests that this sentence was imposed arbitrarily, capriciously or indiscriminately. The sentence is appropriate under these circumstances. See *Jenkins* and *Zuern, supra*.

Pursuant to statutory law, this court is required to weigh the aggravating circumstances against the mitigating factors. This court in *Glenn* analyzed the weighing process.

> "From a review of the mitigating factors disclosed by the evidence, it is also shown that the aggravating circumstances outweigh those mitigating factors and, thus, the death penalty was appropriate. The Ohio Supreme Court has cited with approval the following definition of 'outweigh':

> 'Outweigh. To outweigh means to weigh more than, to be more important than. The existence of mitigating factors does not preclude or prevent the death sentence if the aggravating circumstances outweigh the mitigating factors.
>
> *'It is the quality of the evidence that most be given primary consideration by you. The quality of the evidence may or may not be commensurate* [*83] *with the quantity of the evidence, that is, the number of witnesses or exhibits presented in this case.* (Emphasis added). *Jenkins, supra,* at 172, fn. 9.'" *Glenn,* at 43-44.

Initially, it should be noted that the exact sequence and extent of appellant's actual direct involvement is not specifically detailed in the evidence. However, based upon the direct evidence of the degrees of his actual involvement and the circumstantial evidence implicating appellant in his conjunctive role in the co-defendant's action, we agree with the trial court's verdicts in this cause.

Upon examination of the evidence presented, this court presents its weighing analysis of the aggravating circumstances and mitigating factors in this case.

First, the trial court found beyond a reasonable doubt that appellant committed rape, kidnapping and aggravated arson, each of which is sufficient to constitute the specification for the purposes of aggravated murder under which capital punishment may be imposed. We have previously indicated that we agreed that there was a proper basis for the trial court's verdicts based on the record before us. Each specification shall be analyzed independently.

The evidence [*84] which supported the rape conviction indicated that the victim was subjected to a significant amount of force. This is consistent with the relative size and age differences between the appellant and the victim. Initially, the victim was restrained and his mouth covered, but as the various sexual acts were per formed, he was rendered unconscious. The physical attacks perpetrated on the deceased caused him to vomit and also cause extensive physical damage. Specifically, during the assault, which lasted approximately forty-five minutes, the victim was repeatedly bitten on the penis, which was evidenced by the bite marks. In addition, the autopsy revealed that the deceased had suffered multiple contusions, abrasions, and lacerations on his back, face, and thigh. Furthermore, his genitalia was pulled with egregious force. He was impaled repeatedly with both the blunt end and sharp end of an instrument which was long enough to perforate the rectum and rupture the victim's urinary bladder. As an apparent result of the agony of the cumulative torture, the victim was heard screaming continuously, for a period of twenty to thirty seconds, by passersby. At this time, witnesses observed Combs [*85] on the path behind Valu-King. Additionally, appellant's own statement indicated he remained with the victim while Combs absented himself from the scene, and that he did not go for help. This direct evidence base provides, at the very least, that appellant was the only other person when the victim was experiencing the pinnacle of excruciating pain from these egregious assaults.

The evidence of the kidnapping discloses that the victim was violently assaulted since he was grabbed from his bicycle, was lifted by his neck and was

choked as he dangled in the air. He was also being stripped of his clothing at this point. Next, his head and upper torso was slammed against the bicycle pedal. Apparently, he managed to slip free and run a short distance before being recaptured. He was slammed to the ground several times. He was also repeatedly kicked, suffered multiple blows to the body, and he sustained severe head injuries, which resulted in a subdural hemorrhage. He was strangled with his underwear, almost in a "hanging fashion", as his feet were again lifted off the ground as he was being choked. This action left ligature marks around the decedent's neck. Finally, the victim had been assaulted [*86] and was left while still alive in a secluded area where early medical attention was not likely.

The testimony at trial likewise reveals the following in relation to the aggravated arson. After the assailants completed their sexual assaults, the appellant remained with the victim while the co-defendant departed the area and found a container of charcoal lighter fluid at the back of the Valu King store. When the co-defendant returned to the scene of the crime, the fluid was poured on the victim's face and shoulder. Parts of his clothing were ignited and the victim was set afire. As a result, he suffered third degree burns to his face and neck.

The net effect of this brutalization is that this court has before it three sets of aggravating specifications which include the rape, kidnapping and aggravated arson to weigh against the mitigating factors. Each of these, the arson, the anal penetration and the assaults accompanying the kidnapping could have independently caused death.

Prior to the imposition of the death penalty, however, R.C. 2929.04 requires the consideration of a number of statutory mitigating factors and mandates that these factors be weighed against the aggravating circumstances. [*87] These mitigating factors are as follows:

"(1) Whether the victim of the offense induced or facilitated it;

"(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

"(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

"(4) The youth of the offender;

"(5) The offender's lack of a significant history of prior criminal convictions and deliquency adjudications;

"(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

"(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death."

R.C. 2929.04(C) allows a defendant great latitude in the presentation of evidence at the penalty hearing. The sentencing body must weigh these mitigating factors against the aggravating circumstances; [*88] the history, character and background of the perpetrator; and the nature and circumstances of the crime. R.C. 2929.04(B)

Items one and two are inapposite to the case *sub judice*. Under no characterization of the evidence can the victim be considered to have induced or facilitated this offense in any way other than by simply being young and helpless and incapable of escape. The evidential table is similarly devoid of evidence suggesting that the victim provoked appellant or that appellant was under duress to commit or participate in these violent acts.

The record is replete with competent, credible evidence which states that appellant has a diminished mental capacity. He is essentially illiterate, displays poor word and concept recognition and, allegedly, has deficient motor skills. Appellant is characterized as being mildly to moderately retarded. There is some suggestion that appellant's "mental age" is that of a seven to nine year old boy. Testimony places appellant's I.Q. between 55 and 71, which would cause him to be categorized as mildly to moderately retarded.

Other facts which are demonstrated by the evidence, however, include appellant's ability to conform his conduct [*89] to the requirements of the law and appellant's understanding of the criminality of the acts committed. Appellant's own witness, Doctor Darnall, testified that appellant possessed an intellectual understanding of right and wrong and

further stated that appellant's crimes cannot be attributed to the fact that he was mentally retarded. Appellant's ability to differentiate between right and wrong can also be gleaned from his statement to Sergeant Stewart during the interview process on September 12, in which appellant indicated that he abstained from participating in the alleged theft of the victim's bicycle because such an act would cause him to return to confinement. This evidence demonstrates that appellant understands the difference between right and wrong and could appreciate that the attacks perpetrated on the victim were "wrong." This knowledge of the distinction between correct and criminal conduct is further demonstrated in appellant's audio and video taped statements, in which he alleges that he remained uninvolved with the assaults on the victim because he knew such acts carried criminal penalties and that he did not want to return to confinement. Appellant himself further [*90] urges that, under proper structured supervision, such as that received at Brinkhaven and TCY, he is capable of conforming his conduct to societal standards.

Consideration of evidence delineating appellant's mental retardation is more properly applied when evaluating his ability to knowingly, intelligently and voluntarily waive his constitutional rights. There is no evidence presented that requires the conclusion that this crime was committed because a mental defect precluded appellant from making the correct moral or legal choice.

The fourth mitigating factor is the age of the defendant. R.C. 2929.03 requires that the death penalty be applied only to persons who were eighteen

years of age or older at the time of the commission of the aggravated murder. Appellant was eighteen and one-half years of age at the time of the commission of the offense. Implicit in appellant's mitigation evidence is the argument that appellant's mental age is such that he, *de facto* (if not *de jure)* falls below the requisite age limit for imposition of the death penalty.

As previously stated, courts are reluctant to exculpate persons from their wrongful acts on the basis of mental age. The evidence[*91] in this case indicates that appellant understood that the acts committed were criminal and further demonstrates that he attempted to shift blame to others through his statements to the police. Appellant's acts of exculpation were calculated, cunning and showed no sign of a childlike intellect. Other evidence presented indicates that appellant is "street-wise" and that, although he is handicapped in formal educational settings, he is slick and functional in his environment. Moreover, this is scarcely appellant's first brush with the criminal justice system. In sum, there is insufficient evidence for this court to conclude that the age of the appellant, mental or chronological, is too young for the imposition of the death penalty.

The fifth mitigating factor to be considered is the lack of criminal convictions and delinquency adjudications appellant has had prior to the present conviction. An examination of appellant's criminal record indicates that this particular factor is of no help to him whatsoever. The record manifests that one year prior to the murder, appellant was convicted of the rapes of two women. These crimes

were somewhat reminiscent of the crime which appellant is presently [*92] appealing, as all were violent sexual assaults. Various persons in the trial alluded to other acts of violence in appellant's past, noting that appellant had been arrested ten to fifteen times.

Application of the sixth statutory factor turns on the question of whether the perpetrator of the crime was a participant, rather than a co-principal offender. The trial court, in its review of the mitigation evidence, felt that regardless of which defendant first attacked the victim, both appellant and Timothy Combs engaged in conduct characterized by torture, rape and murder. This court agrees with that assessment. The evidential table indicates the involvement of appellant in the slaying of the victim. Appellant's contention suggesting that he merely observed while co-defendant Timothy Combs tortured and assaulted the victim is overwhelmingly negated by his personal odontological "signature" on the penis of the victim. Again, the record indicates that appellant remained in the field with the victim while Timothy Combs was observed standing on the path. By appellant's own admission, he remained with the victim while Combs procured the lighter fluid. At neither time did appellant seek help [*93] for the victim. This mitigating factor is inapplicable in this case.

The final mitigating factor is a "catch-all" factor which assimilates all other mitigating evidence. Appellant has adduced several factors for consideration. The first of these is the poor family environment in which appellant grew up. Appellant was raised by his mother, who herself is mentally

retarded. He is an illegitimate child. There has generally been no male authority figure in appellant's household, as each of his siblings was sired by a different father, most of whom did not marry appellant's mother.

This court is cognizant of the difficulties which may arise when growing up in an unstable and impoverished family environment. However, there is no evidence which suggests a logical nexus between appellant's childhood and this crime. Incidents of single-parent families in the United States is increasingly common. However, crimes of this savagery are characterized by a fundamental lack of human decency which does not necessarily arise from the condition of one's family life. Although no one would argue that an upbringing in this environment is often detrimental, there is no demonstrable connection between appellant's [*94] family life and the murder of the victim. Moreover, the record before this court does not indicate that appellant's home life caused his siblings to perpetrate violent crimes.

Appellant also argues that the state was deleterious in its duties to him while he was under their supervision and care. The record shows that appellant was sent to several juvenile facilities which were presumably intended to have treatment, educational and penal consequences. Appellant has presented considerable evidence as to the insufficiency of psychological care at these institutions. Nevertheless, appellant maintains that he was making rehabilitative progress at the institutions, progress that was abruptly terminated when appellant was released prematurely. There is testimony from various staff personnel that indicates

that appellant was released from the juvenile facilities against the staff's recommendation.

This court notes that it is distressing when someone who is mentally handicapped is not afforded the support necessary to lead a more full and complete lifestyle. Similarly, it is unfortunate that appellant, for whatever reason, was discharged prematurely from the juvenile facility. However, there [*95] is no evidence which suggests that appellant would have not committed this crime if he had been afforded further treatment or that the converse would be true. There is no evidence presented which demonstrates that appellant's treatment would have been any more effective had he stayed at Brinkhaven for another year. Perhaps the only real inference that can be drawn from appellant's arguments is that appellant would not have been able to commit the murder had he remained at the institution. If this court accepted that argument, we would be obligated to find the state culpable every time a released criminal perpetrated a new offense. Considerations of due process do not permit, nor would society tolerate, life imprisonment for every offense on the grounds that the perpetrator might commit another crime upon release.

Appellant also introduced considerable evidence as to his passive nature. This evidence suggests that appellant is a "follower," easily led (because of his handicap) and influenced by any person with a dominant personality. The inference which appellant intends this court to draw from this evidence is that appellant was misled into the commission of the murder by co-defendant [*96] Timothy Combs.

Several factors, however, militate against this inference. First, this court is aware of the two rapes appellant committed one year before the killing of Raymond Fife. These rapes, which were committed by appellant alone, were accompanied by death threats (both rapes were committed at knife point), both contained forced sexual intercourse (in one instance, anal intercourse), and were accompanied by beatings, and, in one attack, the biting of the victim. Clearly, appellant needed no promptings from a "dominant" person in order to engage in savage and bestial behavior. Additionally, appellant is accused of making homosexual advances toward one youth in the Trumbull County Juvenile Center and threatening to do the same to another child while at TCY.

Further, appellant demonstrated a functional understanding of right and wrong which is incongruous with the portrayal of him as a mere puppet. Appellant's actions, in going on his own to the police and attempting to implicate other persons in the murder of Raymond Fife, are scarcely those of a person with no independent will. Although this court does not dispute that appellant may have aspects of a "follower" in his personality [*97] makeup on occasions, the evidence suggests enough personal will, and a consistent *modus operandi*, which belies the notion that appellant's will was being subsumed by another.

Finally, appellant alleges that a childhood fall caused organic brain trauma which, along with a subsequent bicycle accident, promoted his moral deficiencies, and is a mitigating factor in appellant's behavior. This court notes that almost no evidence of

organic brain damage is demonstrated by appellant. Dr. Darnall, who adduced the only credible evidence on this subject, indicated that any evidence of organic brain disease was slight and that no evidence of psychosis was discovered. This court also recognizes that many children fall during childhood and hit their heads. Contrary to appellant's argument, however, the vast majority do not become sadists and murderers.

The evidence as to appellant's mental and physical condition, age, family, treatment history and passive nature does not outweigh the aggravating circumstances. The record demonstrates that appellant and co-defendant Timothy Combs kidnapped the victim, beat him violently, sexually assaulted him, impaled him with a long wooden instrument, and [*98] burned his face and body by pouring lighter fluid on the boy's face and shoulder and igniting it. Appellant's guilt is demonstrated by direct physical evidence, circumstantial evidence, and the appellant's own statements to the police. There is no question as to the appellant's involvement in the murder.

R.C. 2929.05(A) mandates that an appellate court, upon review, is to consider whether the sentence imposed was excessive or disproportionate to the penalty imposed in similar cases. This court has undertaken the weighing of the proportionality in the discussion of appellant's nineteenth assignment of error. In doing so, this court compared this case with *State v. Glenn, supra,* and *State v. Wiles, supra,* which were cases from this district in which the death penalty was imposed.

The comparison of the case *sub judice* with *Glenn* and *Wiles*, as indicated, demonstrates that the sentence in the present cause is not disproportionate. The facts of this case indicate that appellant committed acts on the victim, Raymond Fife, that not only go beyond the bounds of acceptable human behavior, but also move beyond this court's understanding of behavior which is human at [*99] all.

An extensive review of each assignment of error manifests that they are without merit. After an independent review of the evidence, we conclude that appellant was found guilty of the specifications of kidnapping, rape, and arson beyond a reasonable doubt; the aggravating circumstances outweigh the mitigating factors; and that imposition of the death penalty is proper. In this case, the death penalty was appropriate as the sentence was not excessive or disproportionate to sentences imposed in similar cases.

Accordingly, the judgment of the trial court is affirmed.

Judgment affirmed.

A certified copy of this document shall constitute the separate opinion as to findings of the court in this case within the meaning of R.C. 2929.05(A) and the Clerk of this Court shall immediately make and file such certified copy with the Clerk of the Supreme Court of Ohio.

Pursuant to R.C. 2953.07, this court having affirmed the trial court and the date for execution having passed, this court sets the date of February 26, 1990 for the execution of the death sentence.

MANDATE

TO THE HONORABLE COURT OF COMMON PLEAS WITHIN AND FOR THE COUNTY OF TRUMBULL, OHIO:

The Eleventh District Court of Appeals [*100] commands you to proceed without delay to carry the following judgment in this cause into execution.

Judgment of the Court of Common Pleas is affirmed for the reasons set forth in the Opinion rendered here. It is further ordered that the execution date be set for the 26th day of February, 1990 in accordance with the applicable statutes.